Supreme Court, U. S.
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80-270

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SUSAN PAXMAN AND LESLIE GOUGH,
Petitioners,

v.

HENRICO COUNTY SCHOOL BOARD AND
ALBEMARLE COUNTY SCHOOL BOARD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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August, 1980

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QUESTION PRESENTED

1. Whether the petitioners were properly denied, on the basis of the "good faith" immunity defense, an award of backpay in an action under 42 U.S.C. § 1983 for the violation of their constitutional rights by Virginia school boards in light of this Court's decision in *Owen v. City of Independence, Missouri,* 48 U.S.L.W. 4389 (April 16, 1980).

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Susan Paxman and Leslie Gough, respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 2, 1980 which denied to the petitioners an award of backpay initially granted by the district court.

OPINIONS BELOW

Paxman, et al. v. Wilkerson, et al., 390 F. Supp. 442 (E.D. Va. 1975).

Paxman, et al. v. Campbell, et al., 612 F.2d 848 (4th Cir. 1980).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, reversing the district court's decision in part, was entered on January 2, 1980, and denied the petitioners an award of backpay initially granted by the district court. Petitioners' Petition for Rehearing *en banc* was denied on March 27, 1980. On June 24, 1980 petitioners' application for an extension of time in which to file a Petition for Certiorari was granted to and including August 20, 1980. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the petitioners were properly denied, on the basis of the "good faith" immunity defense, an award of backpay in an action under 42 U.S.C. § 1983 for the violation of their constitutional rights by Virginia school boards in light of this Court's decision in *Owen v. City of Independence, Missouri,* 48 U.S.L.W. 4389 (April 16, 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1971 the petitioners, Susan Paxman and Leslie Gough, brought a bilateral class action under 42 U.S.C. § 1983 on behalf of all public school teachers in Virginia. They sought declaratory relief, as well as backpay, claiming that their teaching contracts were terminated in violation of the due process and equal protection clauses of the Fourteenth Amendment.[1] Specifically, petitioners asserted that the mandatory maternity leave policies enforced by Virginia school boards were unconstitutional. These policies required that teachers who became pregnant, either prior to or during a school term, relinquish their positions within certain time guidelines without consideration of their personal physical conditions or abilities.

On December 6, 1971 suit was filed in district court. Eventually the district court entered summary judgment for the petitioners' class upon this Court's decision in

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[1] Susan Paxman had signed a contract with the Albemarle County School Board and Mrs. Gough with the Henrico County School Board.

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), holding certain mandatory maternity leave policies, not substantially dissimilar to those in question here, violative of the due process clause of the Fourteenth Amendment. *Paxman, et al. v. Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975) (*see* Appendix at 2a). By that order the district court also amended the defendant class to consist of members of school boards, rather than the school boards themselves, and, *sua sponte*, redesignated the suit as a class action within Rule 32(b)(2), rather than Rule 23(b)(1) of the Federal Rules of Civil Procedure. The district court ordered that the plaintiff class be offered reinstatement with backpay.

On January 2, 1980 the United States Court of Appeals for the Fourth Circuit reversed the district court's decision in two major respects. *Paxman, et al. v. Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980) (*see* Appendix at 28a). First, the Fourth Circuit reversed, for reasons not at issue here, the district court's judgment certifying this suit to proceed as a bilateral class action under Rule 23(b)(2). The court then dismissed all but the named plaintiffs, Mrs. Paxman and Mrs. Gough, petitioners herein, and the respective school boards with whom they had contracts.[2]

Secondly, the Fourth Circuit's decision reversed the district court's final order as to the award of backpay, finding that the qualified good faith immunity barred

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[2]The dismissal was without prejudice to the merits of the controversy and the Fourth Circuit remanded the case to the district court to entertain sympathetically, under Rule 24 of the Federal Rules of Civil Procedure, the intervention of those members of the plaintiff class who taught in Henrico or Albemarle

[footnote continued]

any such award. On April 16, 1980 this Court rendered its decision in *Owen v. City of Independence, Missouri,* 48 U.S.L.W. 4839, holding that a municipality has no immunity from liability under 42 U.S.C. § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to liability for back-pay. On April 21, 1980 petitioners moved the Fourth Circuit for an order to recall its mandate to consider reversal or amendment of its original decision in light of *Owen v. City of Independence, Missouri, supra,* which was denied on July 22, 1980.

REASONS FOR GRANTING THE WRIT

A. The Fourth Circuit's Decision Is Directly Contrary To This Court's Decision In *Owen v. City of Independence, Missouri,* 48 U.S.L.W. 4389 (April 16, 1980)

The Fourth Circuit's decision reversing the district court's award of backpay to the petitioners is directly contrary to this Court's decision in *Owen v. City of Independence, Missouri, supra.* The Fourth Circuit expressly held that petitioners were to be denied a backpay award based on the good faith of the defendant school board officials.[3] After a review of the scant case law, including the appellate decision which this Court reversed in *Owen, supra,* the Fourth Circuit noted that:

Counties. The decision further notes that the statute of limitations is probably tolled for all members of the class originally certified by the district court under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974). (Appendix at 41a.)

[3]Indeed this Court noted in *Owen, supra,* that the Fourth Circuit's decision below was one of five courts of appeals divided

[footnote continued]

> [W]e are of the opinion and hold that the defendant school officials connected with Henrico and Albemarle Counties, in their official capacities, are immune from the claims of backpay because they acted in *good faith* without knowledge that the acts they took would violate the constitutional rights of the plaintiffs, and because they did not act with malicious intent. [*See* Appendix at 53a.] [Emphasis added.]

This Court in *Owen v. City of Independence, Missouri, supra,* held directly to the contrary stating that a municipality may not assert the good faith of its officers or agents as a defense to monetary liability under 42 U.S.C. § 1983.[4]

The obvious conflict between the Fourth Circuit's decision below and the Supreme Court's decision in *Owen, supra,* mandates that this Court grant certiorari in this matter and summarily reverse the Fourth Circuit's decision on the authority of its own intervening decision. *Helvering v. Wiese,* 292 U.S. 614 (1933); *Lewis v. Fidelity & Deposit Co.,* 292 U.S. 559 (1933). These cases make it clear that it is of no consequence that the Fourth Circuit's decision below predated this Court's decision in *Owen, supra.* Indeed the Fourth Circuit's

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on the exact question decided by that decision; i.e., whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. *Owen v. City of Independence, Missouri, supra,* 48 U.S.L.W. at 4393, n.15.

[4]The Fourth Circuit recognized that school boards are "persons" under 42 U.S.C. § 1983 in the context of a suit for backpay pursuant to *Monell v. Department of Social Service,* 436 U.S. 658 (1978). The fact that the district court's final order certified the defendant class to consist of school board members did not pose a problem for the court insofar as this Court in *Monell, supra,* recognized that these members, sued in their official capacities, are such "persons" also. *Supra,* at n.55.

decision relied, in part, on the Eighth Circuit's opinion in *Owen v. City of Independence, Missouri,* 589 F.2d 335 (8th Cir. 1978), expressly noting that certiorari had been granted in that case. The Fourth Circuit would have more properly stayed its decision below pending this Court's decision in *Owen, supra,* thereby obviating the need for this unnecessary appeal.

B. Should This Court Not Reverse The Fourth Circuit's Decision Then Petitioners May Be The Only Persons In Their Class Denied Relief In The Form Of Backpay

The Fourth Circuit's decision dismissed all of the unnamed plaintiff and defendant class members leaving only the petitioners and their respective school board employers as parties. Nevertheless the Fourth Circuit remanded the case to the district court to entertain sympathetically motions for intervention by those members of the plaintiff class that taught in Henrico and Albemarle Counties. The court further opened the possibility that future actions, by Virginia teachers who terminated their contracts with Virginia school boards under similarly unconstitutional maternity leave policies, may be pursued by noting that the statute of limitations was possibly tolled by the district court's class certification orders. *See,* n. 2, *supra.* Hence it is possible that other members of petitioners' class, as certified by the district court, may intervene in the district court below or institute actions of their own claiming that they are entitled to awards of backpay under this Court's decision in *Owen, supra.* Thus the anomalous situation may occur where members of the petitioners' class may obtain awards of backpay as a result of this Court's decision in *Owen, supra,* while petitioners, whose suit established the constitutional violations, are denied such relief. This

result would be grossly unfair and mandates that this Court grant certiorari to summarily reverse the Fourth Circuit's decision below.

CONCLUSION

For the foregoing reasons, petitioners urge that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

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August, 1980

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 683-71-R

[Filed: March 5, 1975]

SUSAN PAXMAN, *et al.*

v.

WOODROW WILKERSON, *et al.*

ORDER

In accordance with the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. The order of the Court under date of February 14, 1973, staying the judgment entered on January 23, 1973, be, and the same is hereby, vacated.

2. Defendants' motions to vacate the order of the Court of October 30, 1972, be, and the same are hereby, denied.

3. Plaintiffs' motion to vacate the order of the Court of January 23, 1973, be, and the same is hereby, granted as to all matters except that portion of said order which granted defendant Wilkerson's motion for summary judgment.

4. Defendants' motions for summary judgment be, and the same are hereby, denied.

5. The Court's order of October 30, 1972, be, and the same is hereby, amended as to that portion of said order defining the defendant class to read as follows: ". . . the defendant class is composed of *all members of* all public county and city school boards of the State of Virginia which require that a pregnant school teacher cease her teaching at some time during her period of pregnancy other than a time of her own choosing."

6. The Court's order of November 22, 1972, be, and the same is hereby, amended as to that portion of said order which reads ". . . having concluded that the action is maintainable as a class action pursuant to Rule 23(b)(1)" to read as follows: ". . . having concluded that the action is maintainable as a class action pursuant to Rule 23(b)(2)."

7. Plaintiffs' motion for summary judgment be, and the same is hereby, granted.

It is further ORDERED that counsel for plaintiffs submit, within fifteen days from the date of this order, proposed methods by which backpay or other appropriate relief may be computed for each member of the plaintiff class. The defendants shall, within ten days thereafter, submit counterproposals if they so desire.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

/s/ _____
United States District Judge

Date: 3-5-75

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 683-71-R

[Filed: March 5, 1975]

SUSAN PAXMAN, *et al.*

v.

WOODROW WILKERSON, *et al.*

MEMORANDUM

On December 6, 1971, plaintiffs, Susan Paxman and Leslie Gough, instituted this class action, pursuant to 42 U.S.C. § 1983 and Rule 65(b) of the Federal Rules of Civil Procedure, on behalf of all pregnant teachers in Virginia against the members of all city and county school boards having allegedly discriminatory maternity leave policies which require pregnant teachers to leave their positions at a fixed time prior to childbirth or prevent their returning after birth of the child and prevent teachers from availing themselves of leave policies commonly available for other teachers who, for medical reasons, require leaves of absence. The named defendants consisted of the State Superintendent of Public Instruction, the Division Superintendents of the Henrico and Albemarle County Public Schools, and the individual members of the Henrico and Albemarle County School Boards. Plaintiffs sought declaratory, injunctive and

compensatory relief and invoked the jurisdiction of the Court pursuant to 28 U.S.C. §§ 1343(3) and 2201.

The relevant facts in this matter are, in all material aspects, undisputed. On May 6, 1971, plaintiff Paxman signed an employment contract for the 1971-72 school year to teach English at Albemarle High School. Subsequent to the signing of the contract, plaintiff learned she was pregnant and that her estimated due date was December 26, 1971. On July 26, 1971, she was notified by R. Ben Turner, Chairman of the English Department of Albemarle High School, that she should terminate the contract in accordance with the maternity leave policy maintained by the Albemarle County School Board.[1]

Plaintiff Paxman appeared before the Albemarle County School Board on August 9, 1971 to request that

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[1]The maternity leave policy then in effect in the Albemarle County school system provided:

> A teacher who becomes pregnant prior to reporting for duty at the beginning of a new school term shall report this fact to the Superintendent and obtain a release from her contract.
>
> A teacher who becomes pregnant after commencing her contractual duties shall relinquish her position four months before the expected date of delivery except when the four months period occurs with only one report card period remaining to complete the contractual obligations for the term. The teacher will be required to submit to her principal a physician's statement giving the approximate date of delivery when the pregnancy becomes known.
>
> Teachers in good standing who have completed one year of service are eligible for maternity leave without pay. Such teachers will be allowed to return to the system at a time mutually acceptable to the teacher and the administration.
>
> AT THE DISCRETION OF THE SUPERINTENDENT AND PRINCIPAL, TEACHERS WHO BECOME PREGNANT MAY CONTINUE BEYOND THE ESTABLISHED TERMINATION DATE WHENEVER SUITABLE REPLACEMENTS CANNOT BE FOUND.

she be allowed to fulfill her contract. At that time she presented a letter from her physician, Dr. Guy M. Harbert, Jr., in which he stated that, in the absence of unforeseen complications, he knew of no medical reason she could not teach until the termination of her pregnancy. On August 10, 1971, Mr. Thomas Hurlburt, Clerk of the Albemarle County School Board, wrote to plaintiff Paxman to indicate that the Board had decided to terminate her contract in accordance with their then policy.

With respect to plaintiff Gough, on April 30, 1971, she signed an employment contract to teach mathematics at J. R. Tucker High School in Henrico County for the 1971-72 school term, which commenced on August 23, 1971. On or about October 1, 1971, she informed the Henrico County School Board that she was pregnant and that the expected due date was March 29, 1972. She also requested to be permitted to complete the semester which ended in January of 1972. On October 6, 1971, Mr. A. P. Hall, Jr., Director of Personnel for the Henrico County Public Schools, informed plaintiff Gough that her employment contract would be terminated as of November 23, 1971, which was apparently the date required pursuant to the Henrico County School Board pregnancy regulation then in effect.[2]

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[2]The Henrico County regulation provided:

> Pregnancy of four months duration shall be sufficient cause for termination of contract, and earlier if deemed advisable. This regulation may be waived by the superintendent or his designated representative in individual cases whereby the teacher may continue for another thirty (30) days or so if deemed to be in the best interest of the school system.

[footnote continued]

On or about October 22, 1971, plaintiff Gough's physician, Dr. William T. Moore, provided her with a letter, which she forwarded to the School Board, in which he stated that he had given her permission to work until her expected due date as long as the pregnancy progressed normally. On November 11, 1971, plaintiff Gough received a letter from Joseph B. Seller, Assistant Superintendent for General Administration and Personnel for Henrico County Public Schools, in which he indicated that the School Board had denied her request to teach until the end of the semester, January 23, 1972, but due to the inability of the School Board to find a replacement, she would be allowed to teach until December 17, 1971.

In view of the lengthy history of this matter, a recapitulation of the proceedings is in order prior to turning to the motions now pending before the Court. Following the institution of this action, the named county defendants filed appropriate answers to the complaint and each

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If the employee continues to work during the pregnancy, the school board shall not be held liable in case of miscarriage, accident or any injury to the mother or the offspring.

The teacher shall be required to submit to the Director of Personnel a physician's statement certifying the expected delivery date and approval of continuation of employment.

Any teacher failing to notify the personnel office of pregnancy at least thirty (30) days before the end of the fourth month may be refused re-employment in the future.

A teacher who is on leave of absence, or who has resigned due to pregnancy, may not be employed as a substitute until such time as she would ordinarily be eligible for re-employment.

A period of sixty (60) days must elapse after the delivery date before a teacher may be contracted to teach. A medical statement must be presented verifying the teacher is physically able to return to work.

of the defendants filed motions to dismiss which the Court subsequently denied. The suit was conditionally declared a class action on October 30, 1972.

The matter came on for argument on November 15, 1972 on plaintiffs' motion for summary judgment as well as motions for summary judgment filed on behalf of each of the named defendants. Having expressed its view from the bench that plaintiffs were entitled to the relief sought, and concluding that the action was maintainable as a class action pursuant to Rule 23(b)(1), the Court gave notice, under date of November 22, 1972, to each member of the defendant class that it would entertain written motions any member wished to file as to why any such member should be declared an inappropriate member should be declared an inappropriate member of the class. Motions for exclusion were filed on behalf of the School Board of the City of Staunton, Virginia, and on behalf of each of the named county defendants, which were also subsequently denied.

On January 23, 1973, the Court, by written memorandum, reiterated the opinion it had previously stated from the bench that school board regulations setting forth special provisions for termination of employment or special leave policies, or other special provisions by reason of pregnancy, were violative of the Fourteenth Amendment to the United States Constitution. The Court further indicated that this conclusion was premised on *Cohen v. Chesterfield County School Board,* 326 F. Supp. 1159 (E.D. Va. 1971), which presented substantially identical issues as in the instant cause,[3] and which

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[3]In *Cohen,* the Chesterfield County rule provided that while termination of employment of an expectant mother might be extended if the superintendent received written recommendations

[footnote continued]

had been affirmed by a divided panel of the Fourth Circuit Court of Appeals on September 14, 1972. The Court noted, however, that on January 15, 1973, the Fourth Circuit had reversed its earlier decision following a rehearing *en banc*. *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973). Considering itself duty-bound to follow the law as enunciated by its appellate court, this Court accordingly granted summary judgment for the defendants and dismissed the action.

Thereafter, on February 7, 1973, plaintiffs moved the Court to vacate its order of January 23, 1973 and to refrain from entering a final order until such time as the United States Supreme Court had an opportunity to rule in the case of *Cleveland Board of Education v. LaFleur,* 455 F.2d 1184 (6th Cir. 1972),[4] for which a petition for a writ of certiorari had been filed on November 26, 1972, and until such time as counsel for plaintiff in *Cohen,* who were the same attorneys serving as counsel for the plaintiffs in the instant matter, had an opportunity to file and obtain a ruling on a petition for a writ of certiorari in that matter. On February 14, 1973, the Court, considering said motion to be one properly brought under Rule 60(b)(6), Fed. R. Civ. P., ordered, pursuant to Rule 62(b), Fed. R. Civ. P., that its previous judgment

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from the expectant mother's physician and her principal, and if the superintendent felt that an extension would be in the best interests of the pupils and school involved, termination would, without such recommendations, become effective at least four months prior to the expected birth of the child.

[4]In *LaFleur,* a divided panel of the Sixth Circuit Court of Appeals held that the Cleveland rule, which required maternity leave at the beginning of the fifth month of pregnancy and a three-month post-delivery waiting period before becoming eligible to return to teaching, violated the Equal Protection Clause of the Fourteenth Amendment.

be stayed pending disposition of plaintiffs' motion to vacate.

On March 5, 1973, plaintiffs filed a notice of appeal from this Court's order of January 23, 1973 in which the Court had granted defendants' motion for summary judgment. The named county defendants, as well as the School Board of the City of Staunton, thereafter filed motions to dismiss plaintiffs' appeal. In addition, these parties filed notices of cross-appeal from this Court's orders of October 30 and November 22, 1972, maintaining the class action nature of this suit.

Subsequently, on April 23, 1973, the Supreme Court granted certiorari in both *LaFleur* and *Cohen,* 411 U.S. 947, to resolve the conflict between the Courts of Appeals regarding the constitutionality of mandatory maternity leave policies for public school teachers. These matters were argued on October 15, 1973 and a decision was rendered on January 21, 1974 in which the Supreme Court held that such mandatory termination provisions violated the Due Process Clause of the Fourteenth Amendment. 414 U.S. 632 (1974). On the basis of that ruling, plaintiffs in the instant matter filed a motion for summary judgment on February 20, 1974, which, in light of the fact that this action was then on appeal, caused the Court to inform the parties on March 14, 1974 that no further action would be taken while the matter was before the Court of Appeals. On August 2, 1974, the Fourth Circuit, in a *per curiam* opinion, dismissed the appeal for lack of a final appealable order, finding that this Court's stay of the order from which the parties had appealed was still in effect.

Presently before the Court, therefore, are plaintiffs' motions to vacate the Court's order of January 23, 1973 and for summary judgment. Also before the Court are

motions filed on behalf of the named county defendants to vacate the Court's order of October 30, 1972 and cross-motions for summary judgment. On the basis of the considerable record before it, the Court deems all matters in this action ripe for disposition.

The named defendants advance basically four points in support of their motions. First, they argue that they are immune from suit since they are not "persons" under § 1983 and since they acted in good faith and in accord with longstanding principles of law. Next, the defendants contend that plaintiffs' claims are now moot in light of the school boards' adoption of new policies which strike all references to maternity leave and instead treat these matters as they do all other extended absences due to medical conditions. Third, they suggest that neither the plaintiffs nor the defendants represent classes of interested individuals over which the Court may exercise its jurisdiction. Finally, defendants argue that on the basis of the facts before the Court, the instant matter is distinguishable from and, therefore, not controlled by the Supreme Court's opinion in *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. 632 (1974).

With respect to defendants' first two contentions, the Court concludes that while a defense of immunity from damages clearly has been incorporated into § 1983 doctrine, *Skinner v. Spellman,* 480 F.2d 539 (4th Cir. 1973); *Eslinger v. Thomas,* 476 F.2d 225 (4th Cir. 1973); *Kirstein v. Rector & Visitors of University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970), this defense does not apply to plaintiffs' claims for back pay, which are not simply claims for damages but are rather an integral part of the equitable remedy of reinstatement. *Eslinger v. Thomas, supra* at 230 n.4, citing *Harkness v. Sweeny Independent School District,* 427 F.2d 319 (5th

Cir. 1970), and *Smith v. Hampton Training School for Nurses,* 360 F.2d 577, 581 (4th Cir. 1966).

Moreover, the contention raised specifically by the Henrico County defendants who, relying on *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), argue that they, in their official capacities, are not "persons" for the purposes of obtaining either monetary or injunctive relief pursuant to 42 U.S.C. § 1983, has been rejected by this Court on a number of recent occasions. *See Hirschkop v. Virginia State Bar Ass'n,* No. 74-0243-R, Mem. decis. at 7-9 (E.D. Va., Jan. 7, 1975); *Hogge v. Hedrick,* No. 74-0488-R, Mem. decis. at 4-5 (E.D. Va., Nov. 29, 1974). Suffice it to say that acceptance of defendants' contention would emasculate the Civil Rights Act of 1871 and would effectively overturn the line of cases originating in *Monroe v. Pape,* 365 U.S. 161 (1961), which have considered the principle settled that 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) confer jurisdiction upon federal district courts to hear civil rights actions for both monetary and equitable relief against municipal officials in their official capacities. In the absence of specific guidance from either its appellate court or the Supreme Court of the United States, this Court is unwilling to return to a view of federal law discarded nearly a decade and a half ago. In light of this determination, the Court further concludes that plaintiffs' claims were not made moot by the subsequent policy changes adopted by the named defendants. *See Arkansas Educational Ass'n v. Board of Education,* 446 F.2d 763 (8th Cir. 1971).

As to the defendants' third point, they suggest, on the one hand, that the plaintiffs have failed to satisfy either the numerosity requirements of Rule 23, Fed. R. Civ. P., or the requirement that they be representative of a class

in that the facts and circumstances controlling plaintiffs' rights to continue teaching may vary from those of other pregnant teachers because of differences in school board policies, in prescribed termination dates, in teachers' general health and responsibilities, and in the availability of replacement teachers necessary to insure continuity in the educational process. At the same time, the named defendants assert that the defendant class is inappropriate. In this regard, the Henrico County defendants argue, in an argument unappealing to the Court, that since the various local school boards are constitutionally independent of one another, in the absence of some connective policy link they should not be made to represent all other boards who may be similarly situated. The Albemarle County defendants take a different approach arguing, once again under *City of Kenosha v. Bruno, supra,* 412 U.S. 507 (1973), that since school boards are not "persons" under § 1983, the Court's order of October 30, 1972, in which it defined the defendant class as "all public county and city school boards of the State of Virginia which require that a pregnant school teacher cease her teaching at some time during her period of pregnancy other than a time of her own choosing," was improper.

While the instant matter may indeed present varying facts and circumstances with respect to the individual members of the plaintiff and defendant classes, Rule 23 does not require that all members of the class be identically situated. *Kristiansen v. John Mullins & Sons, Inc.,* 59 F.R.D. 99 (E.D. N.Y. 1973). Nor, for that matter, contrary to the contention of the Henrico County defendants, does the rule require that all persons in the class desire to take advantage of the rights they may have. The fact that some members of the class are

personally satisfied with the action complained of is irrelevant, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), and the injunctive or declaratory relief referred to in the rule does not require the Court to look into the particular circumstances of each member of the class. *See* 3B Moore's Federal Practice, ¶ 23.40, at 23-651, 23-654 (2d ed. 1974).

This action appears to contain all the requisites of a class action as contemplated by the drafters of Rule 23, as amended. *See* Advisory Committee's Note 39 F.R.D. 98, 102 (1966). The plaintiff class is readily identifiable as all pregnant teachers in the Commonwealth of Virginia. That the class is so numerous that joinder of all members is impracticable is evident from the fact that in the Henrico County school system alone, fifty-six teachers were separated during the 1970-71 and 1971-72 school years for reasons of pregnancy.[5] *See* Exhibits H and I to defendant Campbell's affidavit, filed October 6, 1972. Moreover, questions of law and fact are indeed common to the class, they being whether a member of the plaintiff class was forced to leave or refrain from returning to her employ as a teacher due to reasons of pregnancy as a result of school board policy utilizing a

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[5]The Henrico County system was but one of 138 public school systems maintained in Virginia during that period; the number of teachers in the Henrico system represented approximately 3.4% of the number of teachers in the public school systems throughout the State of Virginia. Moreover, defendants' reliance on this Court's denial of class action status in *Spratley v. Surry County School Board*, No. 475-70-R (E.D. Va. 1972), is misplaced since there the Court found that only three teachers had in any way been affected by the county's allegedly unconstitutional maternity leave policy.

conclusive presumption of incapacity.[6] Further, there is no question in the Court's mind that the claims of the representative parties are typical of the claims of the plaintiff class or that they, the named plaintiffs, will fairly and adequately protect the rights of the class members.[7]

With respect to the Albemarle County defendants' contention concerning the impropriety of defining the defendant class in terms of "school boards," the Court concludes there is some merit to this claim in light of the Fourth Circuit's intervening *per curiam* opinion in *Singleton v. Vance County Board of Education*, No. 73-2057 (4th Cir., May 8, 1974), wherein a majority of the panel held that the "Board of Education" was

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[6]*Manard v. Miller*, 53 F.R.D. 610 (E.D. Va. 1971), *aff'd*, 405 U.S. 982 (1972), which is cited by the Henrico County defendants, is clearly distinguishable from the case at bar. There, in an action by Virginia college students claiming the right to register to vote in the state, a divided panel of this Court, finding that the plaintiffs were not representative of other students desiring registration, held that the suit could not be maintained as a class action in that the facts and circumstances controlling the right of applicants to register may vary in respect to each of them, especially in such matters as residence and domicile, as well as in regard to the nature and content of the questions propounded to them by their respective registrars at the time they first sought registration. In the instant matter, however, the class as well as the questions of law and fact have been so carefully limited as to eliminate many if not all of the problems identified by the majority of the Court in *Manard*.

[7]The rights of members of the plaintiff class may well be severely prejudiced should the Court grant the defendants' motion to vacate its order maintaining this matter as a class action in light of the apparent running of the applicable two-year statutory limitation period in effect at the time this suit was instituted. *See Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972).

not a "person" subject to suit under § 1983.[8] In the interests of justice, however, and in view of its earlier analysis of *City of Kenosha v. Bruno, supra,* 412 U.S. 507 (1973), the Court deems it appropriate to amend, *sua sponte,* the defendant class to include the "members" of all such school boards which maintained allegedly discriminatory policies with regard to maternity leave for pregnant teachers.

One final matter remains with respect to the class action nature of this suit. In its order of November 22, 1972, the Court stated that it deemed this action to be maintainable as a class action pursuant to Rule 23(b)(1), Fed. R. Civ. P. Upon reconsideration, the Court has concluded that this is not the case. Since plaintiffs' primary claim appears to involve equitable relief, with damages in the form of back pay being but a part of the equitable relief needed to obviate the alleged past discrimination, this matter is more properly designated a class action pursuant to Rule 23(b)(2). *See Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Sabala v. Western Gillette, Inc.,* 371 F. Supp. 385 (S.D. Tex. 1974). Accordingly, the Court's previous order defining the defendant class will be vacated and modified to the extent it reflects a finding at variance with this determination.

Finally, and as previously noted, the named defendants have moved the Court for summary judgment, alleging

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[8]While the Court finds persuasive Judge Winter's dissenting opinion in *Singleton,* in which he suggests that it is far from settled whether a Board of Education is a "municipal corporation" within the meaning of § 1983 under both *Monroe v. Pape, supra,* 365 U.S. 167 (1961), and *City of Kenosha,* the Court, as previously noted, considers itself duty-bound to follow the authority of its appellate court.

that *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. 632 (1974), does not support plaintiffs' motion for summary reversal of the Court's stayed judgment in favor of defendants. The Henrico County defendants specifically contend that the maternity leave policy in effect within their system at the time this suit was instituted combined termination date guidelines with sufficient flexibility to avoid the rigid policies condemned in *LaFleur* and its companion case, *Cohen v. Chesterfield County School Board.* They allege that depending upon the teacher's health, the school calendar, the availability of a replacement teacher and the teacher's responsibilties, their former policy permitted a pregnant teacher to work well past her fifth month of pregnancy.

Once again, the Albemarle County defendants have chosen a different route. They suggest that in the case of plaintiff Paxman, it was not an instance of a teacher being terminated under a five-month rule, such as was disapproved in *LaFleur.* Rather, they argue that she was terminated solely under the provision of the Albemarle County maternity leave policy which stated:

> A teacher who becomes pregnant prior to reporting for duty at the beginning of a new school term shall report this fact to the Superintendent and obtain a release from her contract.

The Albemarle County defendants contend that this rule has a rational relationship to the educational goal of continuity of instruction recognized by the Supreme Court in *LaFleur* and is, therefore, not in violation of the Due Process Clause of the Fourteenth Amendment.

In *LaFleur,* the Supreme Court found that maternity leave regulations directly affect the fundamental freedom of choice in matters of marriage and family life and, accordingly, the Court posited that "the Due Process

Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." 414 U.S. at 640. While the question squarely before the Court in *LaFleur* was whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards—namely, continuity of classroom instruction and the necessity of keeping physically unfit teachers out of the classroom—justified the particular maternity leave procedures they had adopted, the language of Mr. Justice Stewart's majority opinion supplies the appropriate test for evaluating the validity of the instant claims.

In terms of plaintiff Gough's claim against the Henrico County defendants, there is no question that *Cohen v. Chesterfield County School Board, supra,* is dispositive of this matter, for, while the defendants seek to avoid *Cohen* by arguing that their maternity leave provision provided considerably more flexibility than that which the Supreme Court declared unconstitutional, the Court concludes that this is a distinction without a difference. While it is true that the relevant portion of the Henrico County policy provided that the five-month termination rule may be waived in individual cases "whereby the teacher may continue for another thirty (30) days or so if deemed to be in the best interest of the school system," so, too, in *Cohen,* the Chesterfield County policy allowed that the "[t]ermination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved."

That the Henrico County policy provided some flexibility is evidenced by the fact that plaintiff Gough was permitted to teach until December 17, 1971, while her original termination date following notification of her pregnancy to the school board had been established as November 23, 1971. This extension, however, was provided solely for the convenience of the school board and, despite her request to do so, clearly did not permit plaintiff Gough to teach until the end of the school semester in January of 1972. These facts are nearly identical to those presented in *Cohen,* concerning which the Supreme Court noted:

> Similarly, if continuity were the only goal, it seems ironic that the Chesterfield County rule forced Mrs. Cohen to leave work in mid-December rather than at the end of the semester in January, as she requested. [414 U.S. at 643.]

Moreover, the Court finds that the school board's willingness to extend plaintiff Gough's termination date for its own purposes weighs heavily against the "conclusive presumption" of incapacity apparently underlying the remainder of the board's leave policy. Since the Henrico County defendants advance no justification for their procedures other than those rejected by the Supreme Court in *LaFleur* and *Cohen,* the Court must conclude that the Henrico County maternity leave provision was unconstitutional and that plaintiff Gough's due process rights were thereby violated.

Although plaintiff Paxman's claim and the Albemarle County provision pursuant to which her teaching contract was terminated prior to the start of the 1971 school year provide a slightly different question, the analysis articulated in *LaFleur* is similarly controlling. Certainly where a teacher is pregnant prior to the commencement

of classes, there is good reason to believe that she will require a leave of absence at some point and of some minimal duration during the school year just prior to and shortly after the birth of her child. Likewise, under such circumstances there exists a reasonable expectation that continuity of instruction may be affected, such that a temporary substitute or more permanent replacement teacher will be required, and that difficult administrative decisions might be avoided by a scheme which is tantamount to a unilateral rescission of the employment contract.

With respect to the former concern, the Court in *LaFleur* noted:

> We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom. [414 U.S. at 643.]

Similarly, with regard to the latter contention, the Court in *LaFleur* responded to the school boards' argument that the mandatory termination dates serve the interest of administrative convenience since there are many instances of teacher pregnancy and the rules obviate the necessity for case-by-case determinations, in the following manner:

> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth or even the first month of pregnancy, administrative convenience alone is insufficient to make valid what

> otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals. [414 U.S. at 647.]

Since the Albemarle County School Board provision under which plaintiff Paxman's contract was terminated clearly embodies an irrebuttable presumption of unfitness, regardless of the stage of the pregnancy at the time the school year begins, which presumption unduly penalizes a female teacher for choosing to bear a child, it too must be considered to be constitutionally defective. Accordingly, plaintiff Paxman is entitled to relief in the form of back pay consisting of the earnings she would have received, less any amounts actually earned, had she been permitted to teach until the termination date which she herself had selected.

In view of the Court's determination that this action is maintainable as a class action pursuant to Rule 23(b)(2), Fed. R. Civ. P., and, further, in view of the Court's conclusion that the plaintiff class is entitled to summary judgment against the members of the defendant class, as previously defined, the Court will order that counsel for the plaintiffs will, within fifteen days after the date of the order accompanying this memorandum, submit to the Court proposed methods by which backpay or other appropriate relief may be computed for each member of the plaintiff class. The defendants shall have ten days thereafter in which to file counterproposals. *Cf. Robinson v. Lorillard Corp.*, 319 F. Supp. 835, 843 (M.D. N.C. 1970), *aff'd*, 444 F.2d 791, 802 n.4 (4th Cir. 1971).

An order consistent with the findings of the Court shall issue.

/s/ _____
United States District Judge

Date: 3-5-75

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1506

SUSAN PAXMAN and LESLIE GOUGH,

Appellees,

v.

DR. W. E. CAMPBELL, Division Superintendent, Henrico County Public Schools; MRS. JOHN DECESEBIO, Member, Henrico County School Board; CECIL CHILDRESS, Member, Henrico County School Board; MRS. BETTY McMULLIN, Member, Henrico County School Board; CECIL F. JONES, Member, Henrico County School Board; OLIVER J. SANDS, JR., Member, Henrico County School Board; REV. WALTER WHITT, Member, Henrico County School Board,

Appellants.

No. 75-1507

SUSAN PAXMAN, *et al.*,

Appellees,

v.

SCHOOL BOARD OF THE CITY OF STAUNTON, VIRGINIA,

Appellant.

No. 75-1508

SUSAN PAXMAN, *et al.*,

Appellees,

v.

CLARENCE S. McCLURE, Division Superintendent, Albemarle County Public Schools; COMER SMITH, Member, Albemarle County School Board; DOUGLAS WHITE, Member, Albemarle County School Board; ALLEN KINDRICK, Member, Albemarle County School Board; CARL M. VAN FOSSEN, Member, Albemarle County School Board; H. EDWARD CHAPMAN, Member, Albemarle County School Board; RODGER RINEHART, JR., Member, Albemarle County School Board,

Appellants.

No. 75-1678

SUSAN PAXMAN, *et al.*,

Appellees,

v.

DR. W. E. CAMPBELL, Henrico Division Superintendent; MRS. JOHN DEUSEBIO, Member, Henrico County School Board; CECIL CHILDRESS, Member, Henrico County School Board; MRS. BETTY McMULLIN, Member, Henrico County School Board; CECIL F. JONES, Member, Henrico County School Board; OLIVER J. SANDS, JR., Member, Henrico County School Board; REV. WALTER WHITT, Member, Henrico County School Board,

Appellants.

No. 75-1679

SUSAN PAXMAN, *et al.*,

Appellees.

v.

CLARENCE S. McCLURE, Division Superintendent, Albemarle County Public Schools; COMER SMITH, Member, Albemarle County School Board; DOUGLAS WHITE, Member, Albemarle County School Board; ALLEN KINDRICK, Member, Albemarle County School Board; CARL M. VAN FOSSEN, Member, Albemarle County School Board; H. EDWARD CHAPMAN, Member, Albemarle County School Board; RODGER RINEHART, JR., Member, Albemarle County School Board,

Appellants.

No. 75-1751

SUSAN PAXMAN, *et al.*,

Appellees,

v.

SCHOOL BOARD OF THE CITY OF STAUNTON, VIRGINIA,

Appellant,

VIRGINIA SCHOOL BOARD ASSOCIATION,

Amicus.

No. 75-1792

SUSAN PAXMAN, *et al.*,

Appellees,

v.

MARY ANNE LECOS, ANTHONY T. LANE, MONA BLAKE, JOHN A. CHRISTIANS, RUTH H. DELL, SAMUEL L. EURE, JR., ALFRED S. HODGSON, ROBERT G. HUNT, ANN KAHN, RODNEY F. PAGE, and MARIE B. TRAVENSKY, individual members of the Fairfax County School Board,

Appellants,

VIRGINIA SCHOOL BOARD ASSOCIATION,

Amicus.

No. 75-1948

SUSAN PAXMAN, *et al.*,

Appellees,

v.

VIRGINIA BEACH, VIRGINIA CITY SCHOOL BOARD and their constituent members,

Appellants.

No. 75-1951

SUSAN PAXMAN, *et al.*,

Appellees,

v.

MARY ANNE LECOS, ANTHONY T. LANE, MONA BLAKE, JOHN A. CHRISTIANS, RUTH H. DELL, SAMUEL L. EURE, JR., ALFRED S. HODGSON, ROBERT G. HUNT, JOHN A. GOLDSMITH, WILLIAM E. PERKLIK, WILLIAM S. HOOFNAGLE, WALTER KURYLO, NATHANIAL J. ORLEANS, DAVID J. PATTISON, JOHN F. PEARSON, LENORA PLISSNER, JEFFERY O. WELLBORN, WILLIAM B. WRENCH, RUFUS W. WRIGHT, GENE S. BERGOFFEN, DANIEL R. ROSS, THOMAS BRADLEY SHIPP, and PAUL FREEMAN,

Appellants.

No. 75-1963

SUSAN PAXMAN, *et al.*,

Appellees,

v.

VIRGINIA BEACH, VIRGINIA CITY SCHOOL BOARD, and the CHESAPEAKE, VIRGINIA CITY SCHOOL BOARD and their constituent members,

Appellants.

No. 75-1973

SUSAN PAXMAN, *et al.*,

Appellees,

v.

CLARENCE S. McCLURE, COMER SMITH, DOUGLAS WHITE, ALLEN KINDRICK, CARL M. VAN FOSSEN, H. EDWARD CHAPMAN, and RODGER RINEHART, JR.,

Appellants.

No. 75-1989

SUSAN PAXMAN, *et al.*,

Appellees,

v.

ROBERT C. BEAM, JR., GERALD L. BIEHN, THOMAS W. DIXON, GEORGE A. LaCAS, WILLIAM B. OBENSCHAIN, C. S. PEELER, D. W. PEMBERTON, VIRGINIA G. SHIPPLETT, JOHN CHILES, A. ERSKINE SPROUL, and ROBERT H. TRUXELL, being persons who were or are, during the period December 6, 1969 to June 25, 1975, members of the Staunton, Virginia City School Board, in their individual and official capacities, and the SCHOOL BOARD OF THE CITY OF STAUNTON, VIRGINIA,

Appellants.

No. 75-1990

SUSAN PAXMAN, *et al.*,

Appellees,

v.

DR. W. E. CAMPBELL, MRS. JOHN DEUSEBIO, CECIL CHILDRESS, MRS. BETTY McMULLIN, CECIL F. JONES, JR., REV. WALTER WHITT, and OLIVER J. SANDS, JR.,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued November 14, 1978 Decided January 2, 1980

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL, and PHILLIPS, Circuit Judges.

James L. Sanderlin (Warren E. Zirkle, McGuire, Woods & Battle, on brief), Thomas J. Cawley (McCandlish, Lillard, Church & Best, on brief) (Richard C. Hotvedt & Harry A. Rissetto, Morgan, Lewis & Bockius; Andrew J. Ellis, Jr., Mays, Valentine, Davenport & Moore; Benham M. Black, City Attorney, Staunton, Virginia; William G. Broaddus, County Attorney for Henrico County, John L. Knight and Michael K. Jackson, Assistant County Attorneys; George B. Little, James K. Cluverius, John S.

Graham, III, Browder, Russell, Little, Morris & Butcher, on brief) for Appellants; Philip J. Hirschkop (John B. Mann on brief) for Appellees; (Frederick T. Gray, Walter E. Rogers, Robert L. Musick, Jr., Williams, Mullen & Christian, on brief) for Amicus Curiae Virginia School Boards Association; (Martin J. Flynn, Richard M. Sharp, Frederick C. Schafrick, Shea & Gardner; David Rubin; Michael W. Smith, on brief) for Amici Curiae National Education Association and the Virginia Education Association.

PER CURIAM:

I.

All of the members of the court except Judge Phillips concur in parts I, II, III, and IV of Judge Widener's opinion. Judge Phillips concurs in parts I, III, and IV of that opinion and concurs in the result in part II thereof, but for reasons expressed in his separate opinion.

II.

Four judges would deny monetary relief.

As to Mrs. Gough, Judges Russell and Widener concur in part V of Judge Widener's opinion and would deny monetary relief for the reasons expressed therein. As to Mrs. Paxman, Judge Russell would deny all relief to her for the reasons expressed in his separate opinion, while Judge Widener would deny monetary relief to her for the reasons expressed in part V of his opinion.

Judges Haynsworth and Phillips concur in the denial of monetary relief for the reasons expressed in their separate opinions.

Judges Winter, Butzner, and Hall dissent from part V of Judge Widener's opinion and would grant monetary relief for the reasons expressed in Judge Winter's opinion. For the same reasons, they do not agree with Judges Haynsworth and Phillips in the reasoning for their votes to deny monetary relief. Neither do they agree with Judge Russell's reasons for denying monetary relief to Mrs. Paxman.

III.

Four judges would grant reinstatement. Judges Winter, Butzner, Widener, and Hall concur in part VI of Judge Widener's opinion and would grant reinstatement for the reasons expressed therein.

Judge Haynsworth and Judge Phillips dissent from part VI of Judge Widener's opinion for the reasons expressed in their opinions. They would not grant reinstatement.

While Judge Russell agrees with the principles expressed in part VI of Judge Widener's opinion, he dissents from the result reached therein for the reasons expressed in his separate opinion.

IV.

All the members of the court concur in that part of part VII of Judge Widener's opinion which remands to the district court the question of attorneys' fees in that court.

Four judges would remand the case for ascertainment of an appellate attorneys' fee in excess of $500.

Judges Winter, Butzner, and Hall believe the $500 appellate attorneys' fee mentioned in part VII of Judge Widener's opinion is grossly inadequate. They would remandfor ascertainment of an appellate attorneys' fee in excess of $500 for the reasons set forth in part III of Judge Winter's opinion in which they concur.

Judge Haynsworth also believes the appellate attorneys' fee mentioned in Judge Widener's opinion is inadequate. He would remand for the ascertainment of such attorneys' fees for the reasons set forth in his opinion.

Judges Russell, Widener, and Phillips would grant an appellate attorneys' fee of $500 as set forth in part VII of Judge Widener's opinion.

The mandate of this court will require that the case be remanded for action not inconsistent with this opinion, and, in addition, upon remand, the district court will inquire into and ascertain appropriate appellate attorneys' fees for the plaintiffs' attorneys as set forth in part III of Judge Winter's opinion and part IV of Judge Haynsworth's opinion.

All the members of the court concur in this per curiam opinion.

The judgment of the district court is accordingly

AFFIRMED IN PART,
REVERSED IN PART,
and REMANDED.

WIDENER, Circuit Judge:

This litigation arises out of allegedly unconstitutional maternity leave policies enforced by the Albemarle and Henrico County, Virginia school boards in 1971. Appellees, Susan Paxman and Leslie Gough, brought a class action under 42 U.S.C.A. § 1983[1] on behalf of all pregnant public school teachers in Virginia. They sought declaratory and injunctive relief, as well as back pay, claiming that their teaching contracts were terminated in violation of the due process and equal protection clauses of the Fourteenth Amendment. Relief was sought against the school boards as well as their members, both in their official and personal capacities, as representatives of a class of defendants ultimately defined by the district court as consisting of "all persons who were or are, during the period December 6, 1969 to June 25, 1975, members of a public county or city school board of the Commonwealth of Virginia which required that a pregnant school teacher cease her teaching at some

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[1] § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jurisdiction is claimed under 28 U.S.C. §§ 1343 and 2201. § 2201, a part of the Declaratory Judgment Act, of course, is not a section upon which jurisdiction may be based. There must be an independent basis for jurisdiction before declaratory relief may be sought under § 2201. Wright & Miller, *Federal Practice and Procedure*, § 2766 (1973), and cases there cited. Jurisdiction, here, is thus based on § 1343, and the cause of action on § 1983. Our holding applies to cases under these statutes only. The Supreme Court made this same point clear in its decision in *City of Kenosha v. Bruno*, 412 U.S. 507, esp. p. 513-514 (1973).

time during the period of pregnancy other than a time of her own choosing."

From a judgment of the district court permitting this suit to be maintained as a class action under F.R.C.P. 23(b)(2) and granting broad monetary and injunctive relief against the defendant members of school boards in both their official and personal capacities this appeal was taken.

For reasons that follow, we reverse the district court's judgment permitting this suit to proceed as a class action under Rule 23(b)(2). We also reverse the district court's granting of monetary relief against the named defendants in either their official or personal capacities. We affirm, however, the holding below that the maternity leave policies under which Mrs. Paxman and Mrs. Gough were required to leave their jobs violated the due process clause of the Fourteenth Amendment, and hold that injunctive relief, in the form of reinstatement, is available against the Division Superintendents and members of the Henrico and Albemarle County School Boards in their personal capacities.[2]

I.

The facts are rather uncomplicated and are similar in all material respects for each of the appellees. Susan Paxman was an English teacher employed by the Albemarle County School Board. On May 6, 1971, she signed an employment contract for the 1971-72 school year.

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[2]The record indicates that in late 1972 both the Albemarle and Henrico County School Boards rescinded their maternity leave policies. Therefore, any issues relating to declaratory or injunctive relief against the future enforcement of those policies have become moot.

Shortly thereafter, she discovered she was pregnant, and, on July 26, 1971, was notified by the Chairman of the Albemarle High School English Department that she would have to terminate her contract in accordance with school policy requiring immediate termination if pregnancy occurred prior to the start of the school year.[3] On August 9, Mrs. Paxman appeared before the school board to request that she be permitted to perform her contract. She introduced a letter from her doctor, indicating her fitness to teach until the termination of her pregnancy. Nevertheless, the following day she was formally notified that her contract would be terminated in accordance with standard policy.

On April 30, 1971, Leslie Gough signed a contract with the Henrico County School Board to teach mathematics during the 1971-72 school year. She informed the School Board of her pregnancy on about October 1, 1971, and requested permission to complete the semester.

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[3]The Albemarle County maternity leave policy provided: A teacher who becomes pregnant prior to reporting for duty at the beginning of a new school term shall report this fact to the Superintendent and obtain a release from her contract.

A teacher who becomes pregnant after commencing her contractual duties shall relinquish her position four months before the expected date of delivery except when the four months period occurs with only one report card period remaining to complete the contractual obligations for the term. The teacher will be required to submit to her principal a physician's statement giving the approximate date of delivery when the pregnancy becomes known.

Teachers in good standing who have completed one year of service are eligible for maternity leave without pay. Such teachers will be allowed to return to the system at a time mutually acceptable to the teacher and the administration.

At the discretion of the Superintendent and Principal, teachers who become pregnant may continue beyond the established termination date whenever suitable replacements cannot be found.

On October 6, 1971, she was notified that her contract would be terminated as of November 23 under a policy deeming pregnancy of four months' duration sufficient cause for termination.[4] Mrs. Gough, too, introduced a physician's letter indicating her fitness to continue teaching. She was ultimately allowed to continue until December 17 because of the difficulty of finding a replacement, but was not permitted to finish the semester.[5]

On December 6, 1971, this suit was filed in the district court. It was conditionally certified as a class action by the district court on October 30, 1972, with the defendant class composed of all public, county, and city *school boards* in Virginia with mandatory maternity leave policies. On November 15, 1972, arguments were heard on motions for summary judgment, and, in its order dated November 22, 1972, the district court entered summary judgment in favor of the plaintiff class. In that same order, the district court determined that the suit should be maintained as a class action under F.R.C.P. 23(b)(1).[6]

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[4]The Henrico County policy provided, in pertinent part:

Pregnancy of four months duration shall be sufficient cause for termination of contract, and earlier if deemed advisable. This regulation may be waived by the superintendent or his designated representative in individual cases whereby the teacher may continue for another thirty (30) days or so if deemed to be in the best interest of the school system.

[5]The school semester ended on January 23, 1972.

[6]F.R.C.P. 23(b)(1):

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

[footnote continued]

On January 15, 1973, this court, sitting en banc, reversed an earlier panel decision in *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973), and upheld the constitutionality of a maternity leave policy substantially similar to the ones involved in this case. The district court properly overruled itself and entered summary judgment in favor of the defendant class. That judgment was stayed, however, pending final disposition of the *Cohen* case by the Supreme Court.

On January 21, 1974, that Court reversed our decision in *Cohen* and held certain mandatory maternity leave policies, not substantially dissimilar to those in question here, violative of the due process clause of the Fourteenth Amendment. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). The district court then re-entered its grant of summary judgment for the plaintiffs in the instant case, and at the same time, in the same order, modified its previous rulings in two respects that are critical to certain aspects of the disposition of this appeal. First, it amended the defendant class to consist of *members* of school boards rather than school boards themselves.[7] Secondly, it modified

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(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect there interests.

[7]The Court stated it followed *Singleton v. Vance County Board of Education,* 501 F.2d 429 (4th Cir. 1974), in which this court held that a school board is not a person within the meaning of § 1983.

the class action designation of this suit, *sua sponte,* as coming within Rule 23(b)(2), rather than 23(b)(1), on the ground that primarily equitable relief was involved. If the matter of designating the case a class action under F.R.C.P. 23(b)(3) was ever considered, we do not find it.

II.

A class action is maintainable under Rule 23(b)(2) if the four requirements of Rule 23(a)[8] are met, and if

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole." F.R.C.P. 23(b)(2).

As is clear from the language of the Rule, it is applicable to situations in which a class of plaintiffs seeks injunctive relief against a single defendant—the *party* opposing the class—who has acted on grounds generally applicable to the plaintiff class. *See* Judicial Conference Advisory Committee, Notes to Rule 23(b)(2), 39 F.R.D. 69, 102 (1966). To proceed under 23(b)(2) against a class of defendants would constitute the plaintiffs as "the party opposing the class," and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants

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[8]Under Rule 23(a), it is requisite to the maintenance of all class actions that:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

appropriate. Wright and Miller, *Federal Practice and Procedure, Civil,* § 1775 at 21-22 (1972), states the proposition:

> It should be noted that the injunctive relief must be sought in favor of the class. As a result, an action to enjoin a class from pursuing or failing to pursue some course of conduct would not fall under Rule 23(b)(2) and would have to qualify under Rule 23(b)(1) or Rule 23(b)(3) in order to be given class action treatment.

To the same effect is the 1978 pocket part of the text. We do not feel that the presence of a plaintiff class in this action alters our construction of the Rule, for, in addition to the literal language of Rule 23(b)(2), we rely upon the clearly expressed purpose for which the Rule was adopted:

> **Subdivision (b)(2).** This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Judicial Conference Advisory Committee, Notes on Rule 23(b)(2), 39 F.R.D. 69, 102 (1966).

We therefore hold that the district court erred in certifying this case as a class action under Rule 23(b)(2), and direct that the unnamed members of the defendant class be dismissed (that is, all defendants except those connected with Albemarle and Henrico Counties), such dismissal, however, being without prejudice as to the merits of the controversy.[9]

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[9]Our holding in no way prevents the utilization of Rule 23(b)(2) in cases in which a class of plaintiffs brings suit against more

[footnote continued]

Such action renders unnecessary our consideration of whether summary judgment was entered against those defendants in the court below without meeting the fundamental requisites of due process of law. Members of the school boards other than Albemarle and Henrico strenuously argue that they were not notified of the suit until after summary judgment had been entered against them on the merits of the case.[10] *See Pennoyer v. Neff*, 95 U.S. 714 (1877); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). We do not reach that question here. *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Mr. Justice Brandeis concurring).

Whether a class action by classes of plaintiffs could have been maintained against the Albemarle and Henrico defendants does not appear from the record. The plaintiffs did not attempt to establish that such a class would be sufficiently numerous under Rule 23(a), and the district court did not enter a class certification under Rule 23(c)(1) with respect to such a class.

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than one *named* defendant, each one of which has taken like action affecting directly the individual members of the plaintiff class. *See East Texas Motor Freight v. Rodriguez*, 431 U.S. 345 (1977); *Hill v. Western Electric Co., Inc.*, No. 76-2439 (4th Cir. 1979). Indeed, an intention of the Rule was to facilitate class action treatment in the civil rights area, such as where, for example, an employer and a union are joined as defendants in a complaint alleging racial discrimination in employment. *See* Wright, *supra*, § 1775.

In this case, in contrast, more than 130 different school boards were free to adopt maternity leave policies of entirely unknown differences or similarities. It is uncontradicted that there was no state-wide policy in force, centrally directed or otherwise.

[10]Prior to the district court's March 5, 1975 holding, in which the court held that the plaintiff class was entitled to summary judgment, *members* of such school boards that maintained allegedly discriminatory maternity leave policies were not part of the defendant class as it had been previously defined.

The plaintiffs have the burden of establishing that the requisites of Rule 23(a) are met before they may proceed as class representatives. *Carracter v. Morgan,* 491 F.2d 458, 459 (4th Cir. 1973); *Poindexter v. Teubert,* 462 F.2d 1096 (4th Cir. 1972). We are of opinion, however, that a remand for a class action determination is not necessary to a fair disposition of potential claims arising out of the Henrico and Albemarle County maternity leave policies. In *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), the Supreme Court held that

> where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable", the commencement of the original class suit tolls the running of the [statute of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. *Id.* at 552-53.

We follow *American Pipe* and remand to the district court to entertain sympathetically motions for intervention under F.R.C.P. 24 for a reasonable period of time to be set by the district court for those members of the plaintiff class who taught in Henrico or Albemarle Counties.[11]

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[11] F.R.C.P. 24(b) provides for intervention in the discretion of the district judge upon timely application when, *inter alia,* an applicant's claim or defense and the main action have a question of law or fact in common. Rule 24(a) concerns intervention as a matter of right. *See American Pipe,* p. 525, n.22.

While our remand pertaining to intervention applies only to school teachers in Henrico and Albemarle Counties, there is broad language in *American Pipe* indicating that the statute of limitations

[footnote continued]

III.

Appellants' contention that the maternity leave policies under which Mrs. Paxman and Mrs. Gough lost their jobs were not constitutionally defective under *Cleveland Board of Education, supra,* does not need extended discussion. The district court found that the two policies contained the same "irrebutable presumptions of unfitness" found unconstitutional by the Supreme Court. We agree, and, for reasons stated by the district court, affirm its judgment on that point. We note that Mrs. Paxman's and Mrs. Gough's pregnancies were to terminate during the school year, as did Mrs. Cohen's.

IV.

We next consider whether the district court erred in awarding monetary relief, in the form of back pay, against the individual defendants in their individual capacities. We hold that the defense of qualified immunity applies to this case and is sustained as a matter of law.

In *Wood v. Strickland,* 420 U.S. 308 (1975), the Supreme Court held that, where a suit for damages was brought against school officials by suspended students, those officials enjoyed an immunity from the imposition of personal monetary liability as long as they acted in good faith discharge of their official duties. This rule of qualified immunity is grounded in policy considerations

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would be tolled for all members of the class originally certified by the district court. "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554.

encouraging school officials to exercise independent discretion in daily decision making, free from the intimidating effect of knowing that a wrong decision made in good faith could result in personal financial loss. It also reflects a recognition that capable candidates for school board positions could well be deterred from serving if a contrary rule were to prevail. *See Wood v. Strickland, supra,* at 319-21; *Scheuer v. Rhodes,* 416 U.S. 232, 241-42 (1974). "[I]t is not a tort for the government to govern." *Dalehite v. United States,* 346 U.S. 15, 57 (1953) (Mr. Justice Jackson dissenting).

We reject the distinction, urged by appellees, that, since they characterize the relief sought as equitable, the qualified immunity doctrine has no application. Assuming, *arguendo,* that such characterization is correct, money would yet flow from the pockets of individual school board members to satisfy a judgment, and the policies enunciated in *Wood* are no less persuasive.

While school officials may not be able to avail themselves of ignorance or disregard of "basic, unquestioned, constitutional rights," *Wood, supra,* at 322, neither should they be charged with bad faith for not anticipating the eventual outcome of constitutional issues over which, for an example especially applicable here, federal courts were differing. *See Wood,* p. 317. The Albemarle and Henrico County School Boards enforced a policy the validity of which was the subject of conflicting opinions in two United States Courts of Appeals, *compare Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973), with *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972), not to mention the divided panel and en banc opinions of this court in *Cohen,* as well as the Supreme Court's division in *LaFleur.* It is also worth noting that both

named school boards rescinded their maternity leave policies following the initial panel decision of this court declaring such policies unconstitutional. Under these circumstances, and in the absence of any evidence indicating a reason the rule should not apply, we are of opinion the good faith immunity defense is established as a matter of law. There is no indication the individual defendants "knew or reasonably should have known that the action[s] [t]he[y] took within the[ir] sphere of official responsibility would violate the constitutional rights of the . . . [plaintiffs], or that . . . [they] took the action . . . with . . . malicious intention." *Wood,* p. 322.

V.

The next issue before us is whether, under 42 U.S.C. § 1983, monetary relief in the form of backpay may be awarded from the school board's treasury by suing individual school board members in their official capacities. We hold that in the instant case it may not.

Monell v. Department of Social Services, 436 U.S. 658 (1978), held that school boards were "person[s]" within the meaning of § 1983 in the context of a suit for backpay. It also held that their members sued in their official capacities were such "person[s]." *Monell,* n.55. By so ruling, the Court overturned its holding in *Monroe v. Pape,* 365 U.S. 177 (1961), that Congress had not intended that mhnicipal corporations be included as "person[s]" within the meaning of the statute. Municipality liability can only result where a constitutional tort results "pursuant to official municipal policy of some nature." *Monell,* at 691. The Court by so stating left intact that part of *Monroe* that rejected the presence

of liability on the grounds of respondeat superior. It stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694.

The Court in *Monell,* while rejecting the doctrine of absolute immunity for local governing bodies, refrained from commenting on the scope of any municipal immunity. *Monell, supra,* at 701. Although that issue was not before it, the Court, in a separate part of the opinion devoted solely to the subject of immunity, chose to state: "We express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning'." *Monell,* at 701.

Applying *Monell* to our case, the members of the school boards and school administrative offices sued in their official capacities are "person[s]" under § 1983 and are therefore subject to suit for their unconstitutional acts. The acts complained of here were the result of policies set out by the school boards involved. Therefore, the defendants are among those who may be liable under *Monell. Burt v. Abel,* 585 F.2d 613 (4th Cir. 1978).[12]

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[12]In *Burt* and in *Cale v. City of Covington,* 586 F.2d 311 (1978), we considered the application of *Monell,* but in neither case was the question of immunity considered or decided.

The remaining issue, then, is whether the Court's decision in *Monell* leaves available any qualified immunity as a bar to liability of a school board official sued in his official capacity. We think that it does.

Prior to *Monell,* we had held in *Eslinger v. Thomas,* 476 F.2d 225 (1973), that good faith immunized a state official sued only in his official capacity from liability for money damages. *Eslinger* was a case in which a female student at the University of South Carolina was deprived of employment as a page in the South Carolina Senate because of her sex. She brought suit against the State Senators and various officers of the State Senate, including Thomas, the Clerk thereof. She did not sue Thomas in his individual capacity, rather only in his official capacity as Clerk of the Senate. 340 F. Supp. 866, 890, 895. We held that the clerk was ". . . acting in good faith and, we agree, should not be liable for damages." 476 F.2d at 228. We reasoned that ". . . in the area of sex discrimination, the inchoate state of legal guidelines suggests that good faith, coupled with reasonable grounds to believe one is acting within the law, should be sufficient to preclude liability for damages. [Footnote omitted.] Properly applied, such a test, based on the circumstances of each case, maintains the effectiveness of § 1983 actions, while providing conscientious state officials with some protection against the cutting edge of a rapidly developing legal doctrine." 476 F.2d at 229. While we did require the district court to give injunctive and declaratory relief in *Eslinger,* the only money item sued for was $40 per week ". . . wages as a result of the defendants' discriminatory refusal to hire her as a page." 349 F. Supp. at 889. We stated that no question of reinstatement was involved in the case, and the damage claim, although labeled as one for backpay,

was independent from plaintiff's claim for injunctive relief to ban invidious sex classifications in the hiring of pages. 476 F.2d at 230, n.10. We see no distinction between lost wages as a result of an unconstitutional resolution of the South Carolina State Senate and lost wages as a result of an unconstitutional resolution of a school board, whether the lost wages be called backpay or damages. The Court, in *Monell,* we think has ended any distinction, sometimes made, between backpay and money damages, for it described the "backpay," sued for as "equitable relief," *Monell,* p. 662, as "monetary . . . relief," *Monell,* p. 690. As in *Eslinger,* in *Monell* there was no question of reinstatement. *Bertot, infra,* slip opinion p. 8-9, is in accord.

Few courts have ruled on the issue of the existence of good faith immunity as a defense to a § 1983 suit since the decision in *Monell.* A search of the circuits finds only a handful of cases discussing this matter. Those courts which have ruled on the issue support our belief that the defense of good faith immunity must be made available to municipal government officials acting in their official capacities.

In *Bertot v. School District No. 1, Albany Co., Wy.,* ___ F.2d ___, No. 76-1169 (10th Cir. 1978), over a dissent, the court held that a school district was immune from monetary damages on the ground that the school district and its members, acting in their official capacities, acted in good faith. The court there reasoned that if the doctrine of qualified immunity for good faith actions were available to officers acting in their individual capacities, it should likewise be available to the board collectively and its members acting in official capacities. The reasons compelling the good faith immunity are just as compelling in all instances, the individuals are the

same, and the restrictions on independent judgment are the same, the court said.[13] Accordingly the court refused to overturn the trial court's decision refusing recovery for the plaintiff on a jury finding that the officials had acted in good faith.

In *Owen v. City of Independence, Mo.*, 589 F.2d 335 (8th Cir. 1978), *cert. granted* 48 L.W. 3189 (1979), the court construed *Monell* to imply the *local* governing bodies may assert a limited immunity defense in § 1983 suits brought against them. Here, the court concluded that although the defendant city had stigmatized the plaintiff, a former police chief, through the city's actions regarding the plaintiff's firing and subsequent grand jury investigation, and as a result had violated the plaintiff's constitutional rights, the plaintiff could not recover backpay from the city because the city and its officials had acted in good faith. The court recognized the validity of a defense of good faith immunity to cover both individual defendants and the city as well, insulating them from monetary liability. *Owens, supra,* at 338.

In *Ohland v. City of Montpelier,* ___ F. Supp. ___, 100 L.R.R.M. 2975 (D. Vt., 1979), the district court of Vermont applied the good faith immunity defense to local governing bodies. The court reasoned that the arguments in favor of strict governmental liability are not stronger than those in favor of vicarious liability which was specifically rejected by the Court in *Monell.* The court further reasoned that both the legislative history of § 1983 and the unique problems inherent in the public sector require the insulation of government

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[13] For a discussion of those reasons, *see Wood v. Strickland,* 420 U.S. 308 at 313-322. The court relied on *Wood* and *Butz v. Economou,* 438 U.S. 478 (1978), and *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

from monetary responsibility for acts done with no knowledge that those acts may later be ruled unconstitutional in the same manner as individuals would be so protected.

The district court of Maryland in *Gross v. Pomerleau,* 465 F. Supp. 1167 (1979), held the defense of good faith immunity was available to local governing bodies and their members acting in their official capacities. Relying upon *O'Connor v. Donaldson,* 422 U.S. 563 (1975), and *Wood v. Strickland,* 420 U.S. 308 (1975), the court noted that the Court's holding in *Monell,* that municipalities could be sued, did not mean that they could not avail themselves of the defense of good faith immunity that is necessary for the continuation of government operating vigorously for the public interest.

All of these decisions support this court's ruling in *Eslinger* and illustrate that *Monell* should not disturb our reasoning there. There, to repeat, in a § 1983 case, we held that the Clerk of the South Carolina Senate, sued in his official capacity, was not liable for damages while acting in good faith pursuant to a resolution of the South Carolina Senate. We conclude that *Monell* does not overturn that decision. Therefore, we think that *Eslinger* is persuasive and do not depart from it here. As a result, under *Eslinger,* the plaintiffs are not entitled to monetary relief in the form of backpay because the defendant school board officials acted in good faith. Nowhere in the record is there any indication that the defendants were acting in other than good faith coupled with reasonable grounds to believe they were acting within the law. *Eslinger* at 229.

The Court in recent years has decided that a variety of public officials are entitled to a degree of immunity if their work is to go forward. *E.g., Procunier v.*

Navarette, 434 U.S. 555 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Those and other cases are based on the reasons that public decision makers should not bear the burden of mistakes made in good faith in the course of exercising their discretion; that a too rigid standard of liability would inhibit their actions which are necessary for the public good; that the good faith fulfillment of their responsibilities within the bounds of reason will not be punished; and that they should not exercise their discretion with undue timidity. *Wood* established such an immunity defense for members of school boards and quoted *Scheuer* as follows, at p. 321:

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."

Wood went on to establish a two-prong test for ascertaining whether or not school board members should receive a limited immunity for their official acts, and, although that was in the context of student discipline, we see no reason it should not apply here. The rule is that a member of a school board is entitled to immunity in a suit for damages if he is acting sincerely and with a belief that he is doing right, but he is "not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took

within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clear established constitutional rights that his action cannot reasonably be characterized as being in good faith." 425 U.S. at 322.

While it may be true that there is additional reason to extend immunity to school board members sued in their individual capacities than those sued only in their official capacities, the fear of having to pay a judgment out of personal resources being an added consideration, we, nevertheless, do not believe that the additional reason to grant a defense of good faith immunity to a school board member sued in his individual capacity detracts from the reasons we have mentioned, which apply equally to the member whether sued in his individual or representative capacity. As one court has pointed out, a conscientious school board member will hesitate to act if he knows that his actions, although taken in the utmost good faith and belief in their validity, may subject the board or municipality which he serves to extensive financial liability, and this is especially true when we consider that municipal treasuries are of limited resources.

Perhaps the best reasoned analysis of this problem we have found is in *Ohland,* at p. 2989, which we quote and endorse:

"We hesitate to extend the logic of strict liability in the realm of private enterprise to the governmental arena. Taxpayers are not private investors willingly accepting the risks of doing business in return for anticipated profits. Moreover, governments, unlike private business, cannot choose to avoid acting in areas of greater risk. Nor can governments minimize liability for constitutional torts by engaging in 'product development' or improved procedures when the contours of future constitutional decisions are unknown, and the rights of different groups of possible plaintiffs are potentially in conflict." [Citations omitted.]

"Because so many governmental decisions affect large numbers of potential plaintiffs, a rule of retroactive liability would pose a substantial threat to the quality and efficiency of governmental decisionmaking. The losses that some persons may be forced to bear because a court's finding of unconstitutionality comes too late are not fundamentally different from the losses that many individuals bear as a result of governmental decisionmaking in the areas of health and safety and economic regulation. [Citation omitted.] In all these cases, absent an explicit legislative determination that these losses will be shared, they should be considered part of the accepted risk attending governmental decisionmaking in a complex society."[14]

Applying the *Wood* test, then, to the facts in this case, there is no evidence at all of any impermissible motivation on the part of any defendant in entering into or administering the contracts involved. The federal circuits

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[14]By quoting from *Ohland*, 23 do not imply our decision is based on retroactivity; rather, it is based on good faith immunity.

were divided on the question, as was this court. No rule of settled indisputable law was established on the subject until *LaFleur,* and before the decision in *LaFleur* both Henrico and Albemarle Counties had revoked their previous pregnancy regulations following our panel opinion, and did not even attempt to reinstate them when that opinion had itself been overruled by the en banc court. Malicious intention on the part of the defendants is not even claimed, and, if it were, there is no evidence to support it.

Accordingly, we are of opinion and hold that the defendant school officials connected with Henrico and Albemarle Counties, in their official capacities, are immune from the claims of backpay because they acted in good faith without knowledge that the acts they took would violate the constitutional rights of the plaintiffs, and because they did not act with malicious intent.[14a]

VI.

As we have noted, *Monell* decided that a municipality (school board) in a suit for backpay was a "person" within the meaning of 42 U.S.C. § 1983. As well, it decided that in such suits individual members of the school board sued in their official capacities were such "person[s]". The case went on to state that local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief, as can local government officials be sued in their official capacities in those cases in which the local government could be sued (p. 690 and note 55).[15]

[14a] *Sala v. County of Suffolk,* No. 1056 (2d Cir. 1979), decided while our case was pending, is consistent with this opinion.

[15] The declaratory and injunctive aspects of the case were moot, as the Court acknowledged in its opinion. *Monell,* p. 661.

Were these statements of the Court not enough, we think the individual defendants involved here may be required to perform their official duties in a constitutional manner under *Ex parte Young,* 209 U.S. 123 (1908).

In our case, the unconstitutional policies relating to dismissal or leave for pregnancy have been rescinded, so they are moot. There is no indication the policies will be reinstated. But the question remains as to whether Mrs. Paxman and Mrs. Gough should have been offered reinstatement to their teaching positions, which, of course, is equitable relief and is prospective.

In *Ex parte Young,* the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirements of the Fourteenth Amendment. The relief there "was prospective only." *Edelman v. Jordan,* 415 U.S. 651, 664 (1974). When an official acts under color of state law in a manner which violates the Constitution, ". . . he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Young,* p. 160. We see no difference between *Ex parte Young* and the case at hand. The officials here, acting in good faith under color of state law, have, as municipal officials, nevertheless acted in an unconstitutional manner. They should be stripped of their "official or representative character," *Young,* p. 160, and required to "conform" their "future conduct of . . . office," *Edelman,* p. 664, to the requirements of the Constitution. The individual defendants, conforming their conduct of office to the requirements of the Constitution, must offer reinstatement[16] to Mrs. Paxman and

[16]Whether Mrs. Paxman was eligible for medical leave without pay and its accompanying provision for return to work appears not to have been considered.

Mrs. Gough at the first available opportunity, upon their written requests, which will not affect the continuity of instruction. *See LaFleur,* p. 648-650; *Bertot,* slip opinion p. 9. Such requests should be made within a reasonable time.

VII.

While the defendants have substantially prevailed in these appeals, we think the plaintiffs are entitled to an attorney's fee, from the Henrico and Albemarle defendants, in the amount of $500, for defending their reinstatement on appeal, for in that one aspect they prevailed.

On remand, the district court will decide the question of attorneys' fees for the proceedings in that court. *See Burt,* p. 617-618; *Bonnes v. Long,* No. 78-1168 (4th Cir. 1979).

HAYNSWORTH, Chief Judge, concurring and dissenting:

I concur in the denial of damages, but for reasons that differ from those expressed by my brothers. I dissent from the affirmance of the reinstatement order.

I agree there should be a qualified immunity for members of school boards used in their official capacities from claims for damages. I do not agree that there is any such immunity from awards of back pay incident to the equitable remedy of reinstatement.

I think that reinstatement is wholly inappropriate and unwarranted in these cases and that the claims, while measured by lost pay, as in *Monell,* are claims for damages from which the qualified immunity is present.

I do not think that Mrs. Paxman has any constitutional claim for any relief.

I.

As long ago as *Smith v. Hampton Training School for Nurses,* 360 F.2d 577 (4th Cir. 1966), it appears to me to have been settled that when reinstatement was an appropriate equitable remedy, the related remedy of a back pay award was available. That was the decision of a unanimous *en banc* court, and, until now, it has been consistently followed and applied in suits against defendants sued in their official capacities as shown by the cases cited in the opinion of Judge Winter.

Of course, we can depart from the rule established for this court by our *en banc* decision in 1966 if the Supreme Court, in effect, has directed us to do it. I do not read *Monell* as having done that.

Monell did not involve a claim for reinstatement, as recognized in Judge Widener's opinion. Though measured by lost wages, it was simply a claim for damages,

as is clearly and explicitly stated in the last paragraph of Judge Gurfein's opinion. *Monell v. Dept. of Soc. Services,* 532 F.2d 259, 267 (2d Cir. 1976). In the Supreme Court, the opinions are not so explicit in characterizing the claim. We know from an opinion from the Second Circuit what it was, however, and it is perfectly apparent that the Supreme Court in *Monell* was not wrestling with a problem of a back pay remedy in the context of a valid claim for reinstatement. Hence, I cannot read *Monell* as saying that this court was wrong in its earlier cases differentiating between legal and equitable remedies and treating a back pay claim as an equitable one when sought in conjunction with a valid claim for reinstatement.

The thrust of *Monell* was to enlarge the remedies available to plaintiffs such as these when suing officials such as these school board members in their official capacities. It struck down what theretofore had been thought an absolute immunity. That thrust seems to be quite inconsistent with a reading that the Supreme Court, in passing, proscribed a remedy which theretofore had been thought generally available.

Thus, if there were a valid claim for reinstatement here, I think that lost back pay should also have been awarded.

II.

This is not a case in which reinstatement is appropriate, however. The Supreme Court, in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), found unconstitutional maternity leave regulations requiring termination of the teacher's employment at a fixed time preceding the expected date of delivery. Such a regulation was said to impermissibly burden a teacher's

decision to bear children and to set up an irrebuttable presumption that, after so many months of pregnancy, a teacher was physically unable to continue teaching.

The two school boards had attempted to justify their pregnancy employment termination regulations on the basis of, among other things, service of the interest in continuity of instruction. Each of the school teachers in *LaFleur,* however, had discovered her pregnancy only after commencement of the school year, and the termination of her employment was scheduled to occur within that school year. Of course, the Supreme Court effectively demonstrated that the longer period of teaching by the pregnant teacher would serve the interest of continuity in instruction substantially better than the school board's rules.

In *LaFleur,* the Supreme Court also considered post-delivery maternity leave rules. The Cleveland rules provided that, after delivery of her baby, the young mother might request a return to service provided it were done in writing at least six weeks before the beginning of a semester. She was not assured reemployment, but the rule provided for priority in reassignment to a vacancy for which the teacher was qualified. As Cleveland's rule, Chesterfield County's rule required proof of physical fitness. It also required assurance that the child's care would no more than minimally interfere with job responsibility. It, however, guaranteed reemployment no later than the first day of the school year following declaration of the teacher's eligibility for reemployment.

These reemployment rules were upheld under constitutional scrutiny. Cleveland had a provision that a teacher could not request reassignment until her baby was three months old. That provision was stricken, but the rest of

the two sets of rules were held proper and enforceable. In this case, Albemarle County's rule simply provided for a return from pregnancy leave at a time mutually acceptable to the teacher and the administration. That seems as much of a commitment to the teacher as Cleveland's provision for priority in reassignment at the commencement of a semester at least six weeks after the request for reassignment. Henrico County's regulation simply provided for the lapse of a period of sixty days after the birth before the teacher could be recontracted, the sixty day provision being invalid under *LaFleur*. It required a medical statement of the teacher's physical fitness. As in Cleveland's rule, the rules have contained no explicit guarantee of reemployment, but reemployment was clearly the contemplation of the rules of both the school districts involved in this case.

There is in this case no showing of any failure to comply with any reemployment commitment. Neither teacher sought post-birth reemployment, and neither was wrongly denied it. Underly these circumstances, "reinstatement" to a position never sought seems entirely inappropriate.

If we are now to hold that there is any constitutional right to reemployment, beyond the state law right to enforcement of the reemployment rules according to their reasonable intendment, we will be forging new ground in a case in which it has not been overtly asserted, argued or considered.[1] If we are to hold that a childbearing mother has a constitutional entitlement to

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[1]There was no discussion of this matter in the district court's opinion. In its final, formal order, reinstatement was directed with the payment of lost wages as if employment was, or should have been, continuous. Of course, there is no basis for an assumption that a childbearing mother would have a continuing availability.

reemployment after delivery of her child, it should be done only after careful consideration upon a record, containing findings of fact, which reasonably presents the question for consideration. There is no such record here. There being no showing of a violation of a constitutional right to reemployment, there was no showing of a right to reinstatement.

Since the claim for lost pay is not pendant to any claim for reinstatement, the qualified immunity defense should be available.

III.

As to the measure of the qualified immunity, I find myself in general agreement with the opinion of Judge Phillips.

There is substantially less reason for a qualified immunity for members of a school board sued in their official capacities than there is when they are sued in their individual capacities. Subjective good faith may be the appropriate standard in the latter situation, but something more ought to be requisite in the former. There can be subjective good faith in the presence of unreasonableness and even foolishness. When defendants are sued in their official capacities, the standard should be one of good faith coupled with a standard of reasonableness which may include the performance of reasonable steps to obtain information and advice upon which to make an informed judgment. That is not to say, however, that every wrong negligently inflicted by a municipal official is converted into a constitutional violation. The constitutional violation should be apparent before the problem of qualified immunity arises. Only then need one consider the possible difference between the qualified immunity available to a defendant sued in

his individual capacity and that available to a defendant sued in his official capacity.

After Judge Phillips had prepared his opinion, a new issue of the Columbia Law Review was distributed. In it there is an article[2] by an attorney for the plaintiffs in *Monell,* who is a lecturer in law at Columbia, in which he advocates just such an immunity, based upon tort principles as suggested by Judge Phillips, for municipalities and members of their governing bodies when sued in their official capacities.

He suggests three exceptions to the qualified immunity rule. He would not allow it at all to the extent the municipality had been enriched by its violation of the Constitution or when the constitutional violation was also a clear violation of local law. He would create an absolute immunity if the constitutional violation arose out of an affirmative action program designed and operated in a good faith effort to conform to what was perceived to be the requirements of the Constitution. Of course, we are here concerned with no such possible exceptions, and I need not consider whether any one of the three should be recognized. I would embrace the basic principle that the immunity problem respecting municipalities and their officials should be approached in terms of tort principles after a determination, without resort to such principles, that there has been a deprivation of a constitutional right.

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[2]Schnapper, Civil Rights Litigation After Monell, 79 Col. L. Rev., 213, 240 *et seq.*

IV.

I think Mrs. Paxman had no constitutional claim.

In the spring of the year she signed an employment contract for the next year, and she became aware of her pregnancy a few days later. She notified the school board, and weeks before the beginning of the new school year she was informed that her employment was to be terminated and that she would be replaced by a teacher who could be expected to teach through all of the next school year.

For a teacher known to be pregnant before the start of a school year, the Albemarle rule expressly provided for immediate termination. In *LaFleur* the Supreme Court recognized the importance of continuity in instruction. School boards may reasonably believe that the interest of the children is furthered by beginning the school year with a faculty each of whom may be expected to teach throughout the school year. When a teacher discovers her pregnancy only after the school year has commenced, there is inevitable discontinuity, and the only question addressed by the Supreme Court in *LaFleur* is the right of the teacher in that context to determine when the discontinuity will be experienced. I can find nothing in *LaFleur* to suggest that continuity of employment of a teacher of children cannot be considered by a school board and carry the day in favor of employment of some one else when the pregnancy is known well before the school year commences. Hence, I would hold that Mrs. Paxman suffered no constitutional wrong.

V.

Even under my view, the declaratory relief granted was enough to make the plaintiffs prevailing parties. I agree that their lawyers are entitled to allowance of attorneys' fees. An award of $500 seems to me quite inadequate. I would remand to the District Court with instructions, after consideration of all relevant factors, to determine and allow a reasonable fee.

WINTER, Circuit Judge, with whom BUTZNER and HALL, Circuit Judges, join, concurring and dissenting:

We agree with the majority that, for the reasons it assigns, the district court's certification of the plaintiff and defendant classes and its entry of judgment against the defendant school board members in their individual capacities despite their qualified immunity should be reversed. We also agree that the named plaintiff schoolteachers and of other schoolteachers who are permitted to intervene as plaintiffs should be reinstated. Thus, we concur in Parts I-IV and VI of the majority opinion.* We cannot agree, however, that school board members sued in their official capacities are entitled to the same qualified immunity that they enjoy in their individual capacities, either as advanced in Part V of the majority opinion or in the concurring opinion. We would order a backpay award against them in that capacity. We also think that the attorney's fee award of $500 granted to plaintiffs' counsel by the majority is inadequate. Upon appropriate proof, we would grant a larger amount or we would remand this aspect of the case to the district court to fix a proper amount. Thus, from Parts V and VII of the majority opinion, we respectfully dissent, and we are, of course, in disagreement with the concurring opinion.

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*Since Parts I-IV and VI of the opinion of Judge Widener are concurred in by all of the judges hearing the case and Part VII by a majority of the judges hearing the case, we refer to it as the "majority" opinion and those joining in it as the "majority," even though, with respect to Part V, they are only two in number. The special concurrence of Judge Phillips, in which Chief Judge Haynsworth joins, will be referred to as the "concurring" opinion.

I.

Although the plaintiff schoolteachers were dismissed from their positions in violation of their rights under the fourteenth amendment,[1] the majority holds in Part V of its opinion that the defendant school board members cannot be held liable for backpay in their official capacities. This holding proceeds from the majority's conclusion that a school board member or other local official, even when sued in an official rather than an individual capacity, is immune from liability for any monetary award if he acted in good faith[2] in violating the Constitution. The majority states that our past decisions have already reached this conclusion, relying upon *Eslinger v. Thomas,* 476 F.2d 225 (4th Cir. 1973). We do not think that *Eslinger* supports that proposition. To the contrary, in our view adherence to our past decisions would require us to reject any qualified immunity defense raised by the defendants in their official capacities. Moreover, examination and consideration of the principles and policies underlying the defense of qualified immunity lead us to conclude that the doctrine does not apply when the defendants are sued in their official capacities.

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[1] *See Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974).

[2] The term "good faith" is used in this context to refer not simply to the absence of malice, but rather to the subjective and objective tests for good faith as employed by the Supreme Court in its qualified immunity decisions. *See, e.g., Procunier v. Navarette,* 434 U.S. 555 (1978); *Wood v. Strickland,* 420 U.S. 308 (1975).

A. The *Eslinger* Case.

Eslinger was a suit by a female college student who had been denied temporary employment as a page of the South Carolina Senate on the basis of its policy to employ only males as pages. Although we held the policy to be unconstitutional and enjoined the clerk of the Senate from enforcing the policy in the future, we denied Eslinger's claim against the clerk for monetary relief in the amount she would have earned in the temporary position. Recognizing that the clerk had acted at a time when sex discrimination was not generally viewed as violative of the equal protection clause,[3] we held that the clerk was immunized by his good faith from an award of damages. *Id.* at 228-30.

The majority regards the issue decided in *Eslinger* as identical to the immunity issue before us in the instant case. We believe, however, that the majority reads *Eslinger* too broadly and that the instant case presents issues that were neither addressed nor decided in *Eslinger.* First, although the majority correctly states that *Eslinger* was a suit against the clerk of the Senate in his official capacity, it is significant that the majority, in supporting its statement about the capacity in which the clerk was sued, finds it necessary to cite the opinion of the district court in *Eslinger.*[4] Because we thought the fact of so little significance to the issues on appeal, we only obliquely mentioned and gave no express consideration to the fact that the clerk had been sued in his official

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[3]Plaintiff Eslinger had applied for a position as page a full year before the Supreme Court announced its decision in *Reed v. Reed,* 404 U.S. 71 (1971).

[4]*Eslinger v. Thomas,* 340 F.S. 886, 890, 895 (D. S.C. 1972).

capacity alone.[5] At a time when the law on the immunity of executive officers under 42 U.S.C. § 1983 was in a state of flux,[6] we devoted our attention to the nature of the "good faith" that was required for immunity, rather than to the differences between defendants sued in their individual capacity and those sued in their official capacity.

More importantly, *Eslinger* differs from the instant case in that it did not involve a claim for the equitable remedy of reinstatement with backpay. Plaintiff had never been employed as a page; she was not employed and then wrongfully discharged. Although the plaintiff in that case characterized the monetary relief she sought as "back pay," we viewed her claim, in the absence of any demand for reinstatement, as a claim for the legal remedy of damages. We expressly noted the relation between the nature of the claim for relief and the issue of the clerk's immunity in a footnote, *id.* at 230 n.4, saying that the defense of immunity should not apply when backpay is sought. We also noted that in the cases relied upon by plaintiff to support her contention, backpay had been sought "not simply [as] a claim for damages, but rather [as] an integral part of the equitable

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[5]The only acknowledgment in our opinion that the clerk was being sued in his official capacity appears in a footnote stating that the question of the applicability of the eleventh amendment to suit against a state officer in his official capacity need not be decided. 476 F.2d at 229 n.3.

[6]*Eslinger* was decided before the Supreme Court clarified the elements and applicability of the qualified immunity defense in *Scheuer v. Rhodes*, 406 U.S. 232 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975). The nature of the defense was a much disputed issue before these Supreme Court decisions, and a number of lower courts had reached widely varying conclusions on the issue. *See, e.g.*, cases cited in *Wood v. Strickland*, 420 U.S. at 315 n.7.

remedy of reinstatement." *Id.* Since Eslinger had not sought reinstatement, we regarded her prayer for monetary relief as a "damage claim," *id.*, and on that basis we held that the good faith defense would apply.[7]

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[7]Our view in the *Eslinger* footnote that the legal or equitable nature of a claim for relief is relevant to the availability of a qualified immunity defense finds support in the subsequent case of *Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975), where the Supreme Court stated: "[I]mmunity from damages does not ordinarily bar equitable relief as well." The majority, however, now seeks to avoid the force of the *Eslinger* footnote by arguing that the Supreme Court, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), "has ended any distinction, sometimes made, between backpay and money damages." Maj. op. at 32. If the majority's expansive reading of *Monell* in this respect is correct, then *Eslinger* can no longer be regarded as good authority and the majority's reliance on it is misplaced. As our discussion of *Eslinger* and of subsequent cases in this circuit shows, the *Eslinger* opinion relied heavily on the distinction between legal damages and equitable backpay. If, as the majority states, this distinction, so crucial to *Eslinger*, is no longer valid and must be rejected, then the reasoning and holding of *Eslinger* must be rejected as well.

In any event, we believe that the majority, in concluding that the Supreme Court has ended the distinction between legal damages and equitable backpay, seriously misreads *Monell*. The full sentence in *Monell* on which the majority relies reads as follows: "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaractory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. Even if the majority's reading of the words "monetary . . . relief" to refer specifically to the backpay requested by the *Monell* plaintiffs is accepted, there is nothing in those words to indicate that the Court regarded backpay as identical to legal damages. The Court used the term "monetary" relief, not "legal" relief, and it contrasted this term with "injunctive" relief, not "equitable" relief. We cannot accept the proposition that the Supreme Court's passing reference to "monetary, declaratory, or injunctive relief" was a cryptic rejection of the

[footnote continued]

The case now before us presents the question whether a school board member, sued in his official capacity for equitable relief in the form of reinstatement and backpay, enjoys a qualified immunity for his unconstitutional dismissal of a teacher. *Eslinger,* which did not address the significance of an official capacity suit and which upheld an immunity defense on the ground that legal rather than equitable relief was sought, can hardly provide a complete answer to that question. That *Eslinger* should be so limited—and was intended by us to be so limited—is also shown by three cases that followed.

B. Post-*Eslinger* Cases.

Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975), unlike *Eslinger,* required us to address in detail the differences between suits against defendants in an individual capacity and those against defendants in an official capacity. In a suit against members of a school board, the district court determined that the board had dismissed the plaintiff teacher in violation of her due process rights, and it awarded her backpay.[8] On appeal,

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long-established distinction between legal damages and equitable backpay incident to reinstatement. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 441-47 (1975) (Rehnquist, J., concurring); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48 (1937). Indeed, since *Monell,* the Supreme Court has stated that § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), which permits a backpay award for employment discrimination, "authorizes only equitable remedies." *Great American Federal Savings & Loan Association v. Novotny,* 47 U.S.L.W. 4681, 4683 (June 11, 1979).

[8]Although the plaintiff teacher had originally sought backpay in connection with reinstatement, she abandoned the demand for reinstatement when she reached the normal retirement age. 521 F.2d at 1203.

we vacated the district court's decision and remanded the case for further proceedings. Our concern was that the district court had not made clear whether the judgmemt was entered against the defendants in their individual or their official capacities.[9] Judge Craven's opinion for the court[10] explained that the nature of relief to which the plaintiff teacher would be entitled depended on the distinction between individual capacity and official capacity suits:

> [T]he named defendants possessed the power to reinstate and cause disbursement of back pay from public funds only in their *official* capacities. . . . Private citizens are not empowered to reinstate or order back pay out of school board or county funds.
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> . . . If the defendants are liable in their individual capacities, the measure of damages would not be the equitable one of back pay but instead the value of the contract defendants wrongfully broke. . . . [W]hatever the amount, the award would clearly be money damages and not equitable in nature.

Id. at 1204.

Having explained this distinction, Judge Craven proceeded to define the tasks of the district court on remand. If the district court determined that the defendant school board members were sued in their official

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[9] *Burt* reaffirmed the principle then prevailing in this circuit that a local official could be sued, even in his official capacity, as a "person" under § 1983. 521 F.2d at 1205 (citing *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973).

[10] Each member of the panel filed a separate opinion. An introductory per curiam statement, however, made clear that Judge Craven's opinion represented the views of a majority of the panel on every issue except the calculation of damages. 521 F.2d at 1203.

capacities, then its judgment against them for backpay, so clarified, could be reinstated. If, on the other hand, the district court determined that the suit was against the defendants in their individual capacities, then further proceedings would be necessary. The relief would be legal damages, rather than equitable backpay, and a jury trial would therefore be necessary. If a jury trial is held, Judge Craven noted, "[t]he defendants will be entitled to assert the defense[e] . . . that they possessed the qualified immunity from liability for damages as set out in *Wood v. Strickland,* 420 U.S. 308 (1975)." 521 F.2d at 1206. The holding of the court in *Burt* is thus clear: Only if a teacher sues school board members for *legal* relief in their *individual* capacities will the defense of qualified immunity be available.[11]

This holding was reaffirmed in *Thomas v. Ward,* 529 F.2d 916 (4th Cir. 1975). In that case, a schoolteacher claimed that he had been dismissed in violation of his due process rights, and he sued various education officials in both their official and individual capacities. Although the district court upheld the teacher's claim on the merits, it denied an award of backpay. The district court determined that the defendants, in their official capacities, could not be sued as "persons" under § 1983, and that in their individual capacities they enjoyed a qualified immunity for actions taken in good faith. The plaintiff appealed only from the ruling regarding the official capacity suit. Citing *Burt,* we held that the officials could be sued in their official capacities under

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[11]On remand, the district court made clear that the defendants were sued in their official capacities, and it awarded extensive equitable relief. On appeal from this decision, we found it necessary to remand for further consideration in light of intervening changes in law, not relevant to the present issue of immunity. *Burt v. Abel,* 585 F.2d 613 (4th Cir. 1978).

§ 1983.[12] We therefore reversed the district court's decision in part and directed the entry of a backpay award. This award was ordered despite the finding of the district court, uncontested by plaintiff on appeal, that the defendants had acted in good faith and were therefore entitled to immunity in their individual capacities. Thus, as in *Burt,* we recognized that the defense of qualified immunity does not apply when backpay is sought from officials in their official capacities.

In *Bursey v. Weatherford,* 528 F.2d 483 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 545 (1977), we went further and held that officials sued in their official capacities cannot defend on the basis of qualified immunity, even when legal damages, rather than equitable relief, are sought. Bursey had been convicted in South Carolina for malicious destruction of property after an undercover agent of the South Carolina State Law Enforcement Division had participated in the offense and had posed as Bursey's co-defendant and engaged in discussions with him outside the presence of counsel. The agent later testified against Bursey at the criminal trial. In a subsequent § 1983 action for damages, brought by Bursey against the agent and other state law enforcement officers in both their individual and official capacities, we held that Bursey's rights to effective assistance of counsel and to a fair trial had been violated.[13] Noting that the official in their individual capacities could assert a qualified immunity, we remanded the case to the district court for factfinding on the issue of defendants' good faith. In a footnote, however, we

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[12] *See* n.9 *supra.*

[13] The Supreme Court reversed our holding that Bursey's rights had been violated, but it expressed no views on the immunity issue.

added: "We note that if the suit against [defendants] in their representative capacities is not barred by the eleventh amendment, the defense that they acted in good faith is inapplicable." 528 F.2d at 488 n.8 (citing *Thomas v. Ward,* 529 F.2d 916 (4th Cir. 1975)).

In the case now before us, plaintiffs seek reinstatement with backpay from the defendant school board members in their official capacities. Whether the backpay sought is characterized as legal damages or equitable relief, our decisions in recent years consistently hold that defendants, in their official capacities, cannot invoke the defense of qualified immunity. Those decisions should supply the answer here. Certainly, they show that the majority's reliance on *Eslinger,* for a contrary result, is misplaced.

C. Principles and Policies of Qualified Immunity.

The majority seeks to support its recognition of defendants' good faith defense by examining the principles and policies underlying the defense of qualified immunity, and applying them to the instant case. We agree that this should be done. None of the opinions in *Burt, Thomas,* and *Bursey* contains any detailed analysis of the principles of qualified immunity or of the reasons for allowing or denying the defense in a given situation. In view of the change in the law of official capacity suits under § 1983 wrought by the Supreme Court decision in *monell v. Department of Social Services,* 436 U.S. 658 (1978), it is proper to consider anew the applicability of the qualified immunity defense in official capacity suits.

We start with the two seminal cases, in which the Supreme Court has explained the elemtns of the defense

of qualified immunity and the reasons for allowing an executive officer sued in his individual capacity under § 1983 to avail himself of the defense. In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the Court held that the governor of a state, the officers of the State National Guard, and the president of a state university could assert a qualified, but not absolute, immunity only for actions taken in good faith. The Court explained that this qualified immunity was based on two "mutually dependent rationales":

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 240. The Court thus saw as the two justifications for qualified immunity the unfairness of imposing personal liability on an officer for the innocent exercise of the duties conferred upon him by law and the chilling deterrent effect upon the exercise of such duties that the threat of liability would create.

A year later, in *Wood v. Strickland,* 420 U.S. 308 (1975), the Supreme Court found the dual rationales of *Scheuer,* particularly the deterrence rationale, to justify extension of the qualified immunity defense to school board member sued for damages in their individual capacities. At the same time, the Court clarified the nature of the defense, explaining that it contained both a "subjective" and an "objective" element of good faith:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he

> took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Id. at 322.

These decisions, at the time that they were announced, clearly had no application to suits against municipalities or similar units of local governemtn, because at that time the prevailing law held that a municipality was not a "person" subject to suit under § 1983. *Monroe v. Pape,* 365 U.S. 167, 187-92 (1961). This aspect of *Monroe,* however, was overruled in *Monell v. Department of Social Services,* 436 U.S. 658 (1978),[14] which held that a municipality or other local government unit is subject to suit as a person under § 1983, but that a municipality would not be liable for every unconstitutional action of any of its officers under a theory of *respondeat superior. Id.* at 694. *Monell* also held that the same principles

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[14]The facts in *Monell* were strikingly similar to those in the instant case. The plaintiffs were female employees of the Department of Social Services and the Board of Education of New York City. Their complaint alleged that the Department and the Board had, as a matter of official policy, required pregnant employees to take leaves of absence before such leaves were medically necessary. Their suit, seeking injunctive relief and backpay, was brought against the Department and its commissioner, the Board and its chancellor, and the City of New York and its mayor. Each of the individual defendants was sued in his official capacity only. 436 U.S. at 660-61.

which govern suits against municipalities under § 1983 must also govern suits brought against municipal officers in their official capacities. *Id.* at 690 n.55. *Monell* expressly did not decide, however, whether school boards and their members sued in their official capacities are entitled to the same qualified immunity as are the members sued in their individual capacities.[15] *Id.* at 701. That question was "left to the lower federal courts," *id.* at 714 (Powell, J., concurring). We think that the same rationales of fairness and deterrence that the Supreme Court has applied in *Scheuer, Wood,* and their progeny supply the answer.

The deterrence rationale is concerned with the chilling effect on the administration of government that would result from the imposition of liability for constitutional violations perpetrated by public officials. In the context of imposing personal liability for damages on school board members, the Supreme Court in *Wood* noted that such members have broad decisionmaking power that requires the sound exercise of discretion, and that the imposition of personal liability for deprivations of constitutional rights would inhibit the exercise of such discretion to an unwarranted degree and might actually discourage prospective school board members from seeking office:

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable

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[15] *Monell* did hold that municipal bodies sued under § 1983 do not enjoy an *absolute* immunity. 436 U.S. at 701.

> candidates for school board positions might be deterred from seeking office if heavy burdens *upon their private resources* from monetary liability were a likely prospect during their tenure.

Wood v. Strickland, 420 U.S. at 319-20 (emphasis added).

The Supreme Court recognized, however, that this chilling effect must be balanced against the salutary effect of imposing personal liability for constitutional violations. If liability is imposed for at least some constitutional deprivations, there is an obvious economic incentive for the school board member or other public official to conform his actions within constitutional requirements. In striking this balance, the Court concluded that school board members should not be immune from liability for all unconstitutionl acts, no matter how unreasonable: "[A]bsolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320. The Court thus concluded, by balancing the favorable and adverse deterrent effect of compensating victims of constitutional violations from the personal resources of school officials, that immunity was justified only for actions taken in good faith.

When we turn to the question of compensating constitutional deprivations from public funds in the hands of local government, however, we think that this balance shifts significantly and that no immunity is warranted.[16]

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[16] *See generally The Supreme Court 1977 Term,* 92 Harv. L. Rev. 57, 322-23 (1978); Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922, 956-58 (1976).

While we recognize that a conscientious public official will act so as to avoid an unnecessary drain on public funds, it is a fact of human nature that the official will be less concerned with the expenditure of public funds than with the expenditure of his own personal resources. Moreover, it can hardly be argued that the imposition of governmental liability will deter prospective public officials in any degree from seeking office in the first place. Thus, the chilling effect, recognized in *Wood,* of imposing personal liability under § 1983 is much more attenuated when the liability is to be satisfied from governmental funds.[17]

The Supreme Court itself has recognized the important differences in deterrent effect between personal and governmental liability in *Hutto v. Finney,* 437 U.S. 678 (1978), decided after *Monell.* In a suit brought against Arkansas state prison officials in their official capacities to remedy unconstitutional prison conditions, the district court ordered broad injunctive relief, and the court of appeals, in affirming, ordered the state to pay plaintiffs'

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[17]On the other side of the balance, the positive deterrent effect of imposing liability in encouraging governmental officials to conform their actions to the requirements of the Constitution, is of greater importance in an official capacity suit than in an individual capacity suit. When an official is sued in his individual capacity, the constitutional injury usually arises from an ad hoc decision of that official and its adverse effect is usually limited to the individual plaintiff or plaintiffs. By contrast, *Monell* requires that in a suit against a local government or against a government official in his official capacity, no liability may be imposed unless the injury is caused by execution of a policy or custom established by the government. Thus, the act complained of is not the decision of a single government administrator, but rather the application of a broad-based policy, more likely to affect a larger class of persons. Where the establishment of such general policies is concerned, the public interest in ensuring that constitutional requirements are observed is accordingly greater.

attorney's fees for the appeal under 42 U.S.C. § 1988. The Supreme Court affirmed this award of attorney's fees, holding that assessing the award against the state would not contravene the eleventh amendment. 437 U.S. at 693-700. In response to a suggestion that the fees should be borne by the individual prison officials named as defendants, rather than by the state, the Court stated in a footnote that since the state, rather than the individual defendants, had made the decision to appeal the district court's order, it was appropriate that the state should bear the costs of that appeal. The Court went on to note that imposing the attorney's fee award on the individual officials would "def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.'" *Id.* at 669 n.32 (citing *Wood v. Strickland,* 420 U.S. at 321). Thus, the Supreme Court, while recognizing that imposing personal liability on public officials for attorney's fees would have an undue chilling effect on the exercise of their authority, nevertheless ordered that the attorney's fees should be paid from the state's public funds. This recognition by the Supreme Court of the disparate deterrent effects of personal liability and governmental liability supports our conclusion that in a suit for recovery of damages from the government's funds, no immunity defense is warranted.[18]

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[18]Citing this passage from *Hutto,* an *amicus* brief argues that the Supreme Court has already decided that local governments enjoy no qualified immunity and that this decision is binding upon us. We cannot agree with this extreme position. We do not believe that the Supreme Court would use a brief remark in a footnote as a cryptic way of deciding, as a matter of binding precedent, a controversial constitutional issue upon which it has previously

[footnote continued]

The other rationale for the immunity defense, as set forth by the Supreme Court in *Scheuer*, is that of fairness. The Court stated that a qualified immunity for an official sued in his individual capacity would be warranted because of "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." 416 U.S. at 240. The "mutually dependent" rationale of fairness has been little discussed by the Supreme Court in its subsequent decisions on qualified immunity in individual capacity suits, which have been grounded largely on the deterrence rationale. *See Wood v. Strickland*, 420 U.S. at 318-21; *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *cf. Butz v. Economou*, 438 U.S. 478 (1978) (immunity of federal official sued in individual capacity). When the question of the applicability of a qualified immunity defense in official capacity suits is addressed, however, we believe that the fairness rationale plays a more significat—indeed, a decisive—role.

In individual capacity suits, it is hardly surprising that the fairness rationale has not been more fully developed. When the victim of a constitutional violation seeks to hold personally liable a public official who has acted in good faith, the case involves distributing the loss between two innocent parties. In such a case, fairness considerations are not decisive, and other considerations, such as the importance of protecting the exercise of discretion by public officials as recognized in *Wood*, assume primary

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reserved decision. We do believe, however, that the *Hutto* footnote indicates Supreme Court agreement with our view that the deterrence rationale, which led the Court to grant a qualified immunity for officials sued in their individual capacity, has much less force, if any, when applied in the context of official capacity suits.

importance. When the victim seeks compensation from public funds in an official capacity suit, however, considerations of fairness are quite different. Imposition of liability in such a case would not shift the loss suffered by the victim to another innocent individual but rather would spread the loss among the public. Liability may not be imposed upon the government, of course, unless, as held in *Monell,* the constitutional violation occurred by application of a policy or custom established by that government. When an innocent person suffers a loss by virtue of the execution of an unconstitutional policy or custom affirmatively established by representatives of the public, the choice between leaving the entire burden of the loss on the victim or distributing it among the public as a whole is self-evident.[19] We believe that fairness in such a case permits—indeed, requires—that the loss be shared, and that this fairness rationale applies

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[19]In the context of common law tort suits against a municipality, commentators have relied upon this loss-spreading analysis in urging the abrogation of municipal immunities. *See, e.g.,* K. Davis, *Administrative Law Treatise* § 25.17 (Supp. 1970); W. Prosser, *Handbook of the Law of Torts* § 131, at 978 (4th ed. 1971). One commentator, who has employed the loss-spreading analysis in endorsing the denial of qualified immunity to local governments for constitutional violations, suggests that the analysis may be inapplicable in "cases involving generalized injuries to broad segments of the population," such as actions for damages by an entire black community for injuries caused by a segregated school system. *See* Note, *supra* note 16, at 958. The instant case, of course, does not present this difficult problem, and we express no opinion on the matter. We note, however, that a denial of damages in such a case might be based not on the good faith of the government, but rather on the inappropriateness of a damage remedy under § 1983 for such generalized constitutional injuries.

whether or not the unconstitutionality of the policy or custom was settled at the time it was established.[20]

In sum, the rationales of fairness and deterrence, asserted by the Supreme Court as the fundamental justifications for the qualified immunity defense, do not support the extension of that defense to suits against local governments or against government officials in their official capacities.[21] This conclusion is warranted, we believe, whether the relief sought from the government is characterized as legal or equitable. Holding in the instant case that no immunity defense is available to

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[20]Quoting from *Ohland v. City of Montpelier*, 467 F.S. 324, 345 (D. Vt. 1979), the majority argues that it is inappropriate to view the public as "insurers" for injuries inflicted in good faith by the government on individuals. We would agree with this argument insofar as it applies to the constitutional violations committed unknowingly by a single administrator carrying out his duties. The government as a whole cannot fairly be deemed responsible for such violations. But as the Supreme Court held in *Monell*, the local government itself can be held liable for a constitutional deprivation only if it resulted from the execution of a policy or custom established by the government. Thus, governmental liability is imposed not when the violation is committed by a single administrator, who may err despite the most careful public scrutiny and supervision, but only when the injury is the consequence of an established policy, set by those officials most responsible to the public and most sensitive to public opinion. To compensate victims of such an unconstitutional policy from governmental funds does not impose upon the public the unwitting role of the helpless insurer, but rather places the responsibility for such constitutional injuries where it belongs.

[21]As the majority notes, a few other federal courts have, since *Monell*, concluded that local governments should enjoy the same qualified immunity as their officials enjoy in their individual capacities, but we respectfully disagree with those decisions. We note that one other federal court agrees with us that municipalities sued under the *Monell* doctrine cannot invoke the qualified immunity defense. *Shuman v. City of Philadelphia*, No. 75-1510 (E.D. Pa. April 18, 1979).

the defendant school board members in their official capacities, we would therefore affirm the judgment of the district court insofar as it ordered the named defendants, in their official capacities, to give the named plaintiffs full relief in the form of both reinstatement[22] and backpay.

II.

While agreeing with us that there are significant distinctions between governmental liability and personal liability which caution against extension of the holding in *Wood v. Strickland* to local governments sued under § 1983, the concurring opinion would not deny local governments a qualified immunity defense. Rather, it would hold them immune from liability if they acted with "reasonable care under the circumstances, objectively assessed." This test, it is claimed, is different from the test in *Wood* because, under *Wood*, an individual officer would be immune if he acted in "subjective good faith," while, under the concurring opinion, the local

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[22]Since the majority orders in Part VI of its opinion that the named plaintiffs be reinstated, we concur in that result. We are puzzled, however, by the citations in Part VI to *Ex Parte Young*, 209 U.S. 123 (1908), and *Edelman v. Jordan*, 415 U.S. 651 (1974), which we believe unnecessarily complicate the issue. *Young* and *Edelman* deal principally with the absolute immunity accorded states by the eleventh amendment, which has no application to units of local government, *see, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 279-81 (1977). Surely there can be no doubt that § 1983 authorizes reinstatement as an equitable remedy for an unconstitutional dismissal. Even under the majority's view that the school board members in their official capacities are immune from a backpay award, reinstatement would nevertheless be authorized. "[I]mmunity from damages does not ordinarily bar equitable relief as well." *Wood v. Strickland*, 420 U.S. at 314 n.6.

government would enjoy immunity only if its conduct was reasonable on an objective basis.

We think this an incorrect reading of *Wood* with respect to the scope of the qualified immunity accorded to officials sued in their individual capacities. *Wood* makes it quite clear that subjective good faith alone is not sufficient to immunize an individual school board member from a damage award:

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. . . . Any lesser standard would deny much of the promise of § 1983. . . . [W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew *or reasonably should have known* that the action he took within this sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student.

420 U.S. at 321-22 (emphasis added).[23]

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[23]It was the Court's articulation of this objective standard that caused Justice Powell, joined by three other Justices, to dissent:

> It would impose personal liability on a school official who acted sincerely and in the utmost good faith, but who was found—after the fact—to have acted in "ignorance . . . of settled, indisputable law." . . . This harsh standard, requiring knowledge of what is characterized as "settled, indisputable law," leaves little substance to the doctrine of qualified immunity.

420 U.S. at 327-28 (Powell, J., dissenting).

Thus, the subjective and objective elements of the qualified immunity recognized in *Wood* are not expressed in the disjunctive and mere subjective good faith is not sufficient to immunize an individual officer. It follows, we think, that the proposed intermediate qualified immunity for local governments is not significantly different from that already enjoyed by individual officials. Recognition that the rationales of qualified immunity for individuals do not apply to suits against local governments requires, in our view, that the qualified immunity defense asserted here be unavailable to local governments in any form.[24]

III.

Finally, while we agree with the majority's conclusion in Part VII of its opinion that plaintiffs are entitled to attorney's fees for this appeal under 42 U.S.C. § 1988, we believe that the majority's award of $500 is grossly inadequate. It is true that plaintiffs have not been granted all of the relief that they sought. They have not been successful in obtaining relief on behalf of a plaintiff *class* against a *class* of defendant school boards. Furthermore, the majority has held them not entitled to an award of backpay. Nevertheless, the plaintiffs have succeeded on this appeal in gaining reinstatement. The

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[24]The concurring opinion asserts that we favor a "no-fault, strict liability standard" for suits against local governments under § 1983. The statement is accurate only insofar as it states that we would hold a local government liable for a constitutional violation, regardless of whether it knew of the existence of the constitutional right in question. The actor's state of mind, however, may be relevant to the question whether a constitutional violation was committed at all, and thus whether a cause of action under § 1983 is stated. *See Baker v. McCollan*, 47 U.S.L.W. 4834, 4835 (June 26, 1979).

extent to which plaintiffs obtained all of the relief they sought is only one of many factors to be considered in setting an attorney's fee. *See Wheeler v. Durham City Board of Education,* 585 F.2d 618, 624 (4th Cir. 1978); *Burt v. Abel,* 585 F.2d 613, 617-18 (4th Cir. 1978); *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226 (4th Cir.), *cert. denied,* ___ U.S. ___ (1978).[25]

The majority's award of $500, we believe, accords inadequate recognition to the inescapable minimum amount of time and effort that plaintiffs' attorneys must have expended in these cases. The appeal dates back to 1975, when briefs were filed and oral argument was held before a panel of this court. In 1976, before a decision was issued, the court ordered on its own motion that the cases be set for rehearing en banc and asked the parties to address themselves in particular to the issue whether backpay could be recovered from a municipality under § 1983. This order obviously required additional preparation on the part of plaintiffs' attorneys. Before

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[25]The determination of a reasonable attorney's fee required consideration of a number of factors, including:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d at 226 n.28 (citing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974)).

reargument was had, however, we ordered that proceedings be stayed pending the Supreme Court's decision in *Monell*. Once *Monell* was decided, additional motions and supplemental briefs were filed by plaintiffs. Without detailing every step, this recitation of required services of which we are aware reveals the inadequacy of the majority's award.

Although plaintiff's attorneys have requested a fee award, they have filed no affidavits with this court detailing the amount of time and type of effort expended in representing plaintiffs in this appeal. Rather than summarily ordering the minimal amount of $500, we would either require the filing of such documentation in order to give us a factual basis on which to determine a proper fee, or remand the question to the district court to take proof and to award an appropriate fee.

RUSSELL, Circuit Judge, concurring and dissenting:

As to Mrs. Gough, I concur in all of Judge Widener's opinion except Part VI thereof, and as to that part of his opinion I agree with the principles stated therein, but on the facts of her case I would not require that reinstatement be offered Mrs. Gough because she did not ask for it after her baby was born.

As to Mrs. Paxman, I think she suffered no constitutional wrong for the reasons stated by Judge Haynsworth in Part IV of his opinion. Therefore, I think none of the various opinions filed has any application to her except Part IV of Judge Haynsworth's opinion as mentioned.

PHILLIPS, Circuit Judge, concurring and dissenting:

For reasons given in Chief Judge Haynsworth's dissenting and concurring opinion, I agree that neither of the named plaintiffs has established a constitutional right to be reinstated, and that the named plaintiff Paxman has not established any violation of constitutional right. To that extent, I dissent from the opinion of the court.

For reasons specifically given in this opinion I concur in the holding of the court that the defendant school boards and their members in official capacities are not liable to any monetary claims by reason of a qualified immunity.

Otherwise I join the opinion of the court.[1]

Considering that neither named plaintiff is entitled to reinstatement and that the plaintiff Paxman has not shown any violation of constitutional right in this action now denied class action status, there remains for me only the question whether the named plaintiff Gough has established any right to monetary relief against her school board and its members in their official capacities. On this point, I of course agree with the court that termination of her employment during the school year violated her constitutional rights under *LaFleur.* For this she is entitled to compensatory damages unless the school board defendant and its members in their official capacities enjoy a qualified immunity to this claim.

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[1]Except that I would not find the class action improperly certified under Fed. R. Civ. P. 23(b)(2) for the reason that a defendant class against plaintiff class alignment is never appropriate under 23(b)(2). The proper and sufficient reason in my view is simply that here the defendant class had not "acted or refused to act on grounds generally applicable to the class [of plaintiffs]," as required by that subsection.

On this point I disagree both with the view held by a minority of the court that no immunity exists and with the view that there is a qualified immunity whose scope is defined by the same "good faith" standard announced in *Wood v. Strickland,* 420 U.S. 308 (1975), for state officials sued in individual capacities. I agree that the governmental entity here should not be liable to the claim for monetary relief by reason of a qualified immunity, but think that the scope of that immunity is properly defined in different, more restricted, terms for municipalities than for officials sued as individuals. It is to that point I write.

I.

When the Supreme Court in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), held, partially overruling *Monroe v. Pape,* 365 U.S. 167 (1961), that municipal governments do not enjoy absolute immunity to claims for monetary relief brought under 42 U.S.C. § 1983, it expressly reserved the questions whether they should nevertheless enjoy a qualified immunity and, if so, what the scope of that immunity should be. *Monell,* 436 U.S. at 695, 701; *id.* at 713-14 (Powell, J., concurring). Those questions are squarely presented to us on this appeal, and I think we must address them as quite different questions than those respecting the scope of qualified immunity to be accorded officials sued in their individual capacities.[2]

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[2]I also consider them to be questions not previously addressed authoritatively by this court. With Judge Winter's dissenting opinion and essentially for the reasons it gives, I agree that *Eslinger v. Thomas,* 476 F.2d 225 (4th Cir. 1973), cannot be read as having already committed us to the view that municipalities enjoy the same good faith immunity as do officials sued individually. But

[footnote continued]

An appropriate starting point is to assess the range of possibilities respecting municipalities' exposure to monetary liability for § 1983 violations after *Monell*. That decision made it plain that exposure is to extend only to those acts directly chargeable to the governing entity,[3] and not to acts or defaults of its agents and

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neither do I believe that the cases cited in Judge Winter's dissenting opinion, *Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975), and *Thomas v. Ward*, 529 F.2d 916 (4th Cir. 1975), can properly be read to have committed us to the contrary view that municipalities enjoy no immunity to claims for monetary relief. These latter cases all dealt with claims for back pay pendent to injunctive relief against local government bodies, and at most stand for the proposition that there is no qualified immunity to such "equitable" monetary claims. They did not speak to compensatory damage claims such as that of the named plaintiff Gough here. While I think that *Monell* may well have required a general reexamination of any supposed distinctions for immunity purposes between legal and equitable monetary claims, *see Monell*, 436 U.S. at 712 (Powell, J., concurring), such a reexamination is not necessary here on my view that the only monetary claim now before the court is a legal damage claim. When and if reexamination becomes appropriate it will be of great significance to me that the only basis upon which any degree of qualified immunity to § 1932 claims has been thought required has been the felt need to protect against fiscal calamity in governmental operations—a consideration as to which the arcane distinctions between legal and equitable remedies has not the slightest relevance. We are of course bound by Constitution, statute and rule to labor with the distinctions for jury trial purposes, but not, so far as I can see, for any other—certainly not any derivable from the presumed congressional intent behind 42 U.S.C. § 1983.

[3]This appeal does not require us to explore the full sweep of the "direct" municipal actions that are exposed to possible liability by *Monell*. It suffices to observe that here there is involved the most obvious type: a formal, specific policy of general application, adopted by a local governing body and intended to be executed without significant intermediate discretion.

For this court as for the *Monell* court, the "substantial line-drawing problems" that inhere in the concept of direct municipal

[footnote continued]

employees chargeable to the entity only by *respondeat superior*. Equally clearly, there is to be *some* degree of exposure for such direct acts, "lest [the decision in *Monell*] 'be drained of meaning.'" *Monell v. Department of Social Services*, 436 U.S. at 701 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974)). Within this limited realm of direct municipal action the possibilities therefore range from strict liability (no-fault) back through liability based upon any of various gradiations of fault that have developed in common and, more recently, constitutional, tort law, stopping somewhere short of no-liability irrespective of fault, *i.e.*, absolute immunity.[4] It is the choise among these possibilities that was expressly reserved and left to the lower federal courts in *Monell*.

A court turning to this task is back in the difficult realm of divining what the forty-second Congress intended as remedial sanctions for § 1983 violations. Though *Monell* has now set right the perceived error in *Monroe* that denied municipal government's exposure to *any* remedy, legislative guidance as to the extent of its now revealed exposure is of course as lacking as it was with respect to that of individual officials. *See Wood v. Strickland*, 420 U.S. at 321. Guidance must therefore

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action can await another day's resolution. *Monell v. Department of Social Services*, 436 U.S. at 713 (Powell, J., concurring). It is by this process of line-drawing that municipal liability based on breach of an ordinary negligence standard may be kept within acceptable bounds in relation to omissions to legislate or supervise. *Cf., e.g., Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

[4]In the analysis of competing interests that gave rise to qualified immunity for individual officials in *Wood* and its predecessors, fault emerged as the inevitable determinant of scope.

The traditional common law tort gradations of fault therefore provide the obvious reference points for defining the scope of other official immunities.

be sought where it was sought for the intended scope of individual liability: in pragmatic considerations of the effects of potential monetary liability on fiscal and decision-making functions of local government and in common law tort and municipal law parallels. *Id.* at 316-21.

Those considerations as applied to individual municipal officials' personal liability led the Supreme Court in *Wood v. Strickland* to find such officials immune for all their official actions except those that "[could not] reasonably be characterized as being in good faith." *Id.* at 322. In *Wood,* two types of conduct denying constitutional rights were posited in defining the reach of this qualified immunity: actions taken with actual or constructive knowledge that they were constitutionally impermissible, and actions taken with malicious intent to deny the rights or to cause other injury. *Id.* Analyzed in traditional fault terms, the inclusion of a subjective "good faith" element as a limiting factor in defining the scope of individual immunity in effect immunizes against "mere" or "simple" negligence and exposes to liability only for actions taken with actual malice, with specific intent, or in negligence of the type traditionally characterized as "gross", "wanton," or "reckless."[5]

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[5] *Wood*'s analysis concededly is not made in these traditional fault terms; but they are implicit. Within that analysis there is a suggestion that simple ignorance of the law, *i.e.*, "mere" negligence in failing to know what one "reasonably should have known" might expose the individual official to personal liability. *Id.* at 322. Indeed, the dissent in *Wood* reads the quoted passage as presuming malice from simple ignorance, thereby imposing an intolerably strict burden on individual officials. *Id.* at 328-29 & n.2 (Powell, J., concurring in part and dissenting in part). But the critical final requirement for liability under the standard as defined by the majority in *Wood* is a lack of "subjective" good faith. *Id.*

[footnote continued]

The relatively generous qualified immunity that results for individual officials has been thought necessitated by several factors that weigh heavily in the balance against the constitutional rights denied by the immunized actions. Chief among these is the negative impact that any greater exposure would have upon the ability to attract responsible people to municipal office in the first place, *see, e.g., Wood v. Strickland,* 420 U.S. at 20, and upon their effectiveness as official decision-makers and actors once in office, *see id.* at 319-20. *See also Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1979) (L. Hand, J.). Additionally, parallels in state common law tort doctrines of official immunity have been thought so well settled that Congress could not have intended fully to abrogate them when it enacted § 1983. *See Wood v. Strickland,* 420 U.S. at 316-18. Finally, the potential unfairness in exposing an individual official to personal financial ruin for lacking the prescience and legal resources required accurately to "predict[ ] the future course of constitutional law," *Pierson v. Ray,* 386 U.S. 547, 557 (1967), has been thought to require a fairly wide scope of individual immunity in respect of actions only later judicially determined to have been unconstitutional.

When the same considerations are applied to direct action taken by municipal government itself through its governing boards, a wider exposure (more qualified immunity) based upon more demanding fault standards

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at 321-22. It seems inevitable that in application by triers of fact this bottom-line requirement of a subjective lack of good faith will be the critical factor in adjudication. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 Yale L.J. 447, 461 (1978).

than those applied to individual officials seems plainly indicated. This may be tested by looking at each consideration separately.

The consideration of attracting responsible individuals to municipal offices in the first place cannot be thought a substantial factor here. Exposure of the public treasury to monetary claims for constitutional deprivations is not likely to have any substantial chilling effect on responsible candidacies for public office.

The potential chilling effect on official action of the governing entity presents a closer question. The majority opinion assumes, and finds support in the decisions of other federal courts, that exposure of the public treasury to § 1983 claims will have substantially the same inhibiting effect on forceful governmental action by governing bodies as would exposure of their private purses have upon the decisions and actions of individual officials comprising the bodies. *See Bertot v. School District No. 1,* ___ F.2d ___ (10th Cir. 1978) (No. 76-1169); *Owen v. City of Independence,* 589 F.2d 335 (8th Cir. 1978); *Ohland v. City of Montpelier,* ___ F. Supp. ___, 100 L.R.R.M. 2975 (D. Vt. 1979); *Gross v. Pomerleau,* 465 F. Supp. 1167 (D. Md. 1979). *But see Kostka v. Hogg,* 560 F.2d 37, 41 (1st Cir. 1977). This suggests for the majority as for those other courts the appropriateness of defining the qualified immunity of municipal governments in precisely the same terms as those applied to individual officials. With all respect for these contrary judicial views as well as for the sense of public responsibility had by most officials, I simply doubt the validity of that assumption. We all must necessarily draw on our perceptions of human nature here, having no empirical evidence to guide us. My own assessment is that exposure of the public treasury would impose substantially

less constraint upon vigorous and forceful governmental action by a governing body than would exposure of the private purses of its members for the same action. From this I conclude that a more stringent standard of care is suggested for corporate governmental action to ensure the same level of concern for constitutional rights that is thought to be ensured by the good faith standard determinative of personal liability of individual officials.[6]

Turning next to considerations of state common law parallels in respect of municipal immunity, the picture confronting the forty-second Congress was essentially one of absolute immunity in respect of governmental functions.[7] It seems highly unlikely that in breaching this citadel of absolute immunity the Congress could have intended to open the gates to the maximum exposure of strict liability. But no reason appears why it may not have contemplated a different and more stringent standard for municipal immunity than the good faith standard then typically applied to individual officials.

Turn finally to considerations of the elemental fairness and practicality of holding municipal government to knowledge of the current state of constitutiona law or more critically, to "predicting its future course" when it is in an evolving, unsettled state. It seems clear that concerns of elemental fairness and practicality have been dominant in adoption of the good faith standard for individual officials. It has simply been thought unfair

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[6]Reflecting my perception that the balance properly being sought here is the maximum amount of deterrence at all levels that is compatible with personal and governmental ability practically to avoid constitutional mistakes in the first place and to respond without financial ruin to those nevertheless made.

[7]*See Monell v. Department of Social Services*, 436 U.S. at 720–21 (Rehnquist, J., dissenting).

and impractical to impose any higher standard than one looking ultimately to the heart rather than the head or will of an individual official even where constitutional rights are at stake.

This is a concession that need not be made in respect of local government itself out of comparable concerns for fairness and practicality. There are resources available to local government officials acting corporately as a governing body that are not available to the governmental officials acting alone. Chief among these is the resource of corporate action itself. Among other reasons for constituting multiple member bodies as ultimate governing authorities in municipal government is the public expectation that three or five or seven heads are likely to be wiser acting in official conclave under rules of order than one acting alone and frequently *ad hoc.* And not only wiser, but more circumspect and more knowledgeable, particularly in respect of matters, including the legality of contemplated action, requiring reliance upon professional advice provided by public funds. It seems reasonable to assume that a Congress undoubtedly conscious of this higher level of public expectation built into the very structure of municipal government would have contemplated a correspondingly higher standard of care in respect of direct local government actions.

It seems also reasonable, however, to assume that Congress could not, for equally valid public policy reasons, have intended to impose upon municipalities a strict liability standard in which no limiting inquiry of exculpating factors related to fault would be appropriate Those public policy reasons have recently been well-stated in *Ohland v. City of Montpelier,* ___ F. Supp. ___, 10 L.R.R.M. at 2978, *quoted in* the majority opinion at pp. 39, 40. *Ohland*'s analysis is compelling

in its assessment of the inappropriateness of imposing strict liability on local governments as a matter of contemporary public policy.[8] Attempting to find the intention of the Congress in 1871 on the matter, it seems reasonable to assume a like perception of the inappropriateness of imposing a no-fault, strict liability standard at that time.

With caution, it may also be observed that the *Monell* Court, on a record in which constitutional deprivation was clear, declined to take the opportunity thereby presented to announce a rule of strict liability that would have been dispositive of the liability issue in that case.[9]

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[8]When the comentators have looked to public policy considerations of risk-allocation, chill-effect, and the threat of fiscal calamity as determinants of the appropriate standard for municipal liability they have come out divided. *Compare, e.g.*, Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409, 444-45 (1978), *with, e.g.*, Note, *Liability of State and Local Governments Under 42 U.S.C. § 1983*, 92 Harv. L. Rev. 311, 323 (1978).

The most compelling public policy reason for rejecting a strict liability standard is the potential for actual fiscal ruin that it could pose for the honestly, reasonably careful municipal government whose constitutional mistake was subsequently determined to have caused compensable harm to large numbers of individuals. This prospect has led some commentators who generally favor strict liability to suggest a special qualified immunity for this type situation. Note, *supra* at 323; *see* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 958 (1976). Though it may be realized but rarely in actual experience, and with increasing rarity as the deterrent effect of municipal exposure is experienced, the threat remains a real one and must be taken into account.

[9]*See also Monell v. Department of Social Services*, 436 U.S. at 713 n.9 (Powell, J., concurring).

II.

As this discussion has indicated, I believe that municipalities should be held to have a qualified immunity in respect of § 1983 claims for monetary relief, *i.e.*, that they should not be held to strict liability, but that their immunity should be defined by a stricter standard than the good faith standard applied to individual officials by *Wood* and its predecessor cases. The appropriate standard, and one which it seems fair to assume was the limit that could have been inteded by the Congress in 1871, would be the traditional fault standard defining ordinary negligence in tort law: reasonable care under the circumstances, objectively assessed.

No need exists in this case to anticipate the way in which this standard might be applied to every type of direct action exposing municipalities to potential monetary liability under § 1983. Suffice it to say for the type action involved here that while it would not demand prescience in predicting the future course of constitutional law, it would demand a careful use of all the resources available to the governing board acting corporately to be advised on the matter as fully as might reasonably be expected of the board as constituted and situated. This would certainly look to the provisions made by the board for obtaining competent legal counsel in the realm of constitutional law, to the way in which that counsel was made available to the board in respect of particular problems, and to the care with which it was utilized by the board in the particular situation in question. Under this standard, "good faith" in the sense of an absence of malice or specific intent or recklessness would not immunize a municipality whose governing board had failed to take steps reasonably available to it

to avoid acting unconstitutionally, with reasonableness gauged solely on an objective basis.

As indicated at the outset, I believe that under this standard as well as the good faith standard the named school boards in this appeal are not liable for the monetary relief sought. The reasons which the majority found probative of good faith on the facts of this case are also probative here of care reasonable under the circumstances. Because the two standards will not always, however, necessarily yield the same reslt when applied to the same facts,[10] it seems important to me that the different standards now be recognized. I would do so in this decision of the en banc court.

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[10]It might be thought that the good faith test of *Wood* as transposed to municipalities would ordinarily yield the same results in actual litigation as would an avowedly objective due care test. This would be on the basis that a municipality's "good faith" would be tested against a stricter standard precisely because of its better opportunity to act in an informed manner. It seems much more likely that inquiry specifically directed to a municipality's "good faith" would be nothing more than inquiry into the subjective good faith of the several individuals making up the corporate body (or that of the prevailing majority if the unconstitutional action was by a divided vote?). Factual inquiries into subjective states of mind of individuals are difficult enough. The very idea of making informed factual inquiry into the subjective good or bad faith of a corporate entity is so anomalous that for this reason alone such a standard seems inappropriate. Fact finding would inevitably founder in the attempt to apply it rationally, and some standard other than the one supposedly controling would actually be applied. Ensuring in practice the wider exposure to liability that seems appropriate for municipalities therefore requires the imposition of a different, more stringent standard of care, and not a hoped-for stricter application of the same standard.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1506/1507/1508
75-1678/1679/1751
75-1792/1948/1951
75-1963/1973/1989
and 75-1990

[Filed: March 27, 1980]

SUSAN PAXMAN, *et al.*,
Appellees,

v.

DR. W. E. CAMPBELL, *et al.*,
Appellants.

ORDER

No judge of the court having requested a poll of the court, it is accordingly ADJUDGED and ORDERED that rehearing en banc by the full court shall be, and it hereby is, denied.

The members of the court who participated in the decision are unanimously of opinion that rehearing ought to be denied, and it is accordingly so ADJUDGED and ORDERED.

With the concurrences of Judge Haynsworth, Judge Winter, Judge Butzner, Judge Russell, Judge Hall, and Judge Phillips.

/s/ _____
For the Court

No. 80-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUSAN PAXMAN AND LESLIE GOUGH,
Petitioners,

v.

HENRICO COUNTY SCHOOL BOARD
AND
ALBEMARLE COUNTY SCHOOL BOARD,
ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September, 1980

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit improperly deny petitioners an award of back pay by refusing to recall its Mandate in *Paxman, et al.* v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), in order to apply retroactively *Owen* v. *City of Independence, Missouri,* 48 U.S.L.W. 4389 (April 16, 1980)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-270

SUSAN PAXMAN AND LESLIE GOUGH,
Petitioners,

V.

HENRICO COUNTY SCHOOL BOARD

AND

ALBEMARLE COUNTY SCHOOL BOARD,
ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Paxman, et al. v. *Campbell, et al.*, Nos. 75-1506, *et al.* (4th Cir., July 22, 1980) (denying motion to recall the mandate) (See Appendix p. 1a).

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980).

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975).

STATEMENT OF THE CASE

This litigation began December 6, 1971, when two teachers, Susan Paxman and Leslie Gough, filed a class action against members of the Albemarle and Henrico County School Boards challenging their maternity leave policies. In 1972, both Albemarle and Henrico voluntarily rescinded their maternity leave policies and did not seek to reestablish them despite a 1973 decision from the Fourth Circuit Court of Appeals, sitting en banc, upholding similar maternity leave policies.[1]

The challenged maternity leave policy of each respondent provided for reinstatement following the end of the teacher's pregancy. Both petitioners were wives of university students who were in their respective communities on a temporary basis only. Neither petitioner has at any time following termination of pregnancy requested reinstatement. An award of back pay in this case as an adjunct to reinstatement is a misnomer.

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[1] *Cohen* v. *Chesterfield County Board of Education*, 474 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

SUMMARY OF ARGUMENT

This Court Should Refuse To Grant The Writ Of Certiorari Or, In The Alternative, If It Grants The Writ, Summary Reversal Is Inappropriate

This Court should not grant the Petition For Writ Of Certiorari because the Fourth Circuit Court of Appeals expressly and specifically designated a method by which petitioners could pursue the relief they request. Moreover, the Court's prior decisions are controlling and dictate that *Owen, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978) and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) should not be applied retroactively to *Paxman.* If the Court's prior decisions are not controlling on the issue of retroactivity, then the Court should not apply *Owen, Monell* and *LaFleur* retroactively without full briefing and argument of this issue, which has substantial impact on public schools and local governments.

ARGUMENT

In their Petition for Writ of Certiorari, Susan Paxman and Leslie Gough ask the Court to apply retroactively the rules established by *Owen, Monell* and *LaFleur.* Petitioners state that the "obvious conflict between the Fourth Circuit's decision below and the Supreme Court's decision in *Owen, supra,* mandates that this Court grant certiorari in this matter and summarily reverse the Fourth Circuit's decision."[2] By failing to mention the question of retroactivity, petitioners seek to have this Court gloss over the question of retroactive application of these decisions. The relief petitioners seek could have devastating consequences for local treasuries.

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[2] Petition for Writ of Certiorari, p. 6.

The writ sought is procedurely and substantively unnecessary. On July 22, 1980, the Fourth Circuit Court of Appeals ruled that the petitioners' request that *Owen* be applied retroactively should be presented in the first instance to the district court.[3] This Court therefore should not grant the writ because petitioners have a specifically designated forum in which to pursue the relief they request. Petitioners raise the specter that they "may be the only persons in their class denied relief in the form of back pay."[4] Petitioners should not be heard to raise this imaginary inequity when, in pursuing relief, they have elected to ignore the method provided by the Court of Appeals. A grant of the writ is unnecessary as petitioners have another appropriate forum open to them; and denial of the writ will produce no inequity or unfair treatment.

A further and more fundamental reason why this Court should not grant the writ is that prior decisions of the Court control and dictate that the trilogy, *Owen, Monell* and *LaFleur,* should not be applied retroactively to the Henrico County and Albemarle County School Boards.[5] Each of these cases was decided after the actions of the respondents that gave rise to the petitioners' claims and after the policies in question had been repealed by each of the school boards involved.

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[3] *Paxman, et al.* v. *Campbell, et al.,* Nos. 75-1506, *et al.* (4th Cir., July 22, 1980) (denying Motion to Recall Mandate). See Appendix, p. 1a.

[4] Petition for Writ of Certiorari, p. 7.

[5] The reasons why *Owen, Monell* and *LaFleur* should not be applied retroactively were addressed in the proceedings below. *See* Response of Appellants, Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. VanFossen, H. Edward Chapman, and Rodger Rinehart, Jr., Members of The Albemarle County School Board, To Appellees' Motions To Recall Mandate And to Direct District Court To Stay Entry Of Judgment, pp. 7-17 (filed May 2, 1980); Henrico County Appellants' Memorandum In Opposition To Motion

Under the rationale of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), *Owen, Monell* and *LaFleur* should not be applied retroactively. *Chevron* remains the benchmark for the retroactivity question.[6] There, this Court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[7]

Application of these principles to *LaFleur* dictates that it not be applied retroactively. *LaFleur* was a decision of first impression and its resolution was not clearly foreshadowed. Indeed, it reversed *Cohen* v. *Chesterfield County*

To Recall Mandate, pp. 5-10 (filed May 2, 1980); Supplemental Brief for Appellants, Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. VanFossen, H. Edward Chapman and Rodger Rinehart, Jr., pp. 22-27 filed on behalf of the members of Respondent Albemarle County School Board (filed October 27, 1978) (addressing retroactivity of *Monell* and *LaFleur*); Suggestion for Hearing En Banc (filed September 19, 1978).

[6] *See Lemon* v. *Kurtzman,* 411 U.S. 192, 197-99 (1973). *See also City of Phoenix* v. *Rolodziejski,* 399 U.S. 204 (1970), *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969).

[7] 404 U.S. at 106-07.

Board of Education, 474 F.2d 395 (4th Cir. 1973), an en banc decision, which confirmed the validity of similar maternity leave policies. Despite the fact that such policies had found widespread acceptance, the Albemarle and Henrico School Boards rescinded their policies in 1972, two years prior to this Court's decision in *LaFleur.* Thus, retrospective application will not further the operation of *LaFleur.* Such an application can only produce substantial, inequitable results by penalizing public school systems whose officials were unable to discern the evolution of constitutional law. Moreover, it would be doubly inequitable to couple a retroactive application of *LaFleur* with the financial penalties brought by a retroactive application of *Owen* and *Monell.* This is particularly true in this case where neither teacher sought reinstatement to her position.

As with *LaFleur,* the *Chevron* principles require that *Owen* and *Monell* not be applied retroactively. Together *Owen* and *Monell* strip municipal bodies of all immunity. In *Monell,* the Court overruled *Monroe* v. *Pape,* 365 U.S. 167 (1961) and held that municipal bodies are "persons" within the meaning of 42 U.S.C. § 1983. This eliminated the absolute immunity to suit under § 1983, previously held by municipal bodies. In *Owen,* the Court ruled that municipalities are not entitled to a qualified "good faith" immunity. Mr. Justice Powell observed in his dissent in *Owen* that *Owen* "inexplicably departs from this Court's prior decisions under § 1983."[8] He noted that under *Owen* and *Monell* "municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability."[9] It cannot be denied that *Monell* overruled clear past precedent and neither it nor *Owen* was foreshadowed. Until *Owen-Monell,*

[8] 48 U.S.L.W. at 4399 (J. Powell, dissenting).
[9] *Id.* at 4401.

municipal bodies or their officials could be held liable for money damages only if they acted in bad faith. *Owen-Monell* clearly overturns this past state of the law.

Owen and *Monell* demand a new approach to decision-making by public bodies. Prior to those decisions, this Court suggested that public bodies and officials must be free to pursue decisions vigorously because such an approach to decision-making would enhance the public good.[10] After *Owen* and *Monell* a new standard of conduct is required for and a new consideration is injected into official decision-making. When confronted with a claim of possible constitutional violation if certain action is taken, the municipal body must now gauge the effect on the local treasury of a future adverse ruling by a court even though the contemplated action seems constitutional under the existing state of the law.[11] Under the new policy of *Owen-Monell* municipal bodies now must exercise extreme caution.

Even if the dramatic shift of emphasis caused by *Owen-Monell* is appropriate, retroactive application of those cases will not further their operation. To the contrary, such a result will produce substantial inequities and may lessen respect for the law as a guiding principle. After *Owen-Monell* municipal bodies are on notice of the stricter standard to be applied to their decision-making and of the need to have adequate financial reserves or insurance to cover any wrong decisions. Petitioners suggest that municipal decisions made many years prior to *Owen* and *Monell* when there was no need for insurance should be judged by the radically different standards first articulated in those cases. This would be unfair.

In light of the new rule enunciated in *Owen,* municipal

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[10] *See Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).
[11] *See* 48 U.S.L.W. at 4397.

bodies now may plan for the threat of financial liability based upon future changes in constitutional requirements by insuring or setting aside funds. The Albemarle and Henrico County School Boards had no reason to seek insurance or to set aside funds to cover claims such as Mrs. Paxman's and Mrs. Gough's. It would be inequitable and unfair to impose monetary damages on respondents by a retroactive application of *Owen, Monell* and *LaFleur.*

Historically, some courts have lessened the impact of judicial abolition of immunity by applying such decisions purely prospectively so that they do not even affect the merits of the case in which the new rule was announced.[12] Other courts have lessened the impact of abolition of immunity by limiting the retroactive effect of the new rule to the case that established the rule, under what is referred to as the "reward" theory.[13]

Commentators as well have advocated the nonretroactive application of decisions that abrogate doctrines of charitable and governmental tort immunity. One com-

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[12] *See, e.g., Colby* v. *Carney Hospital,* 254 N.E.2d 407 (Mass. 1969); *Williams* v. *City of Detroit,* 111 N.W.2d 1 (Mich. 1961); *Spanel* v. *Mounds View School District,* 118 N.W.2d 795, 803-04 (Minn. 1962); *Hicks* v. *State of New Mexico,* 544 P.2d 1153, 1158-59 (N.M. 1975).

[13] *See, e.g., Jackson* v. *City of Florence,* 320 So.2d 68, 74-75 (Ala. 1975); *City of Fairbanks* v. *Schaible,* 375 P.2d 201, 211 (Alaska 1962); *Parish* v. *Pitts,* 429 S.W.2d 45, 52-53 (Ark. 1968); *Smith* v. *State of Idaho,* 473 P.2d 937,950 (Idaho 1970); *Molitor* v. *Kaneland Community Unit District No. 302,* 163 N.E.2d 89, 97-98 (Ill. 1959), *cert. denied,* 362 U.S. 698 (1960); *Parker* v. *Port Huron Hospital,* 105 N.W. 2d 1 (Mich. 1960); *Jones* v. *State Highway Commission,* 557 S.W.2d 225, 231 (Mo. 1977); *Brown* v. *City of Omaha,* 160 N.W.2d 805, 809 (Neb. 1968); *Merrill* v. *City of Manchester,* 332 A.2d 378, 383-84 (N.H. 1974); *Becker* v. *Beaudoin,* 261 A.2d 896, 902 (R.I. 1970); *Holytz* v. *City of Milwaukee,* 115 N.W.2d 618, 626 (Wis. 1962); *Kojis* v. *Doctors Hospital,* 107 N.W.2d 292 (Wis. 1961); *Oroz* v. *Board of County Commissioners,* 575 P.2d 1155, 1159 (Wyo. 1978).

mentator notes that "courts should allow the public entities time in which to re-evaluate their fiscal policies and prepare to meet their new responsibilities through insurance or additional revenue appropriations." [14] While *Owen* and *Monell* abrogate a different type of immunity, the above rationale and the reasoning of the previously cited state court cases are equally applicable to compel a nonretroactive application of *Owen* and *Monell*. Through nonretroactive application, a change such as *Owen-Monell* may be made without denying to the municipal body the necessary time to incorporate the new stricter standard into its decision-making process and to provide insurance and other protection of its existing programs.

The majority in *Owen* clearly intended municipal bodies to consider and incorporate the new, stricter rule in future decision-making. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." [15] To apply *Owen* and *Monell* to municipal decisions made prior to *Owen* would in no way be an incentive for officials to "err on the side of protecting citizens' constitutional rights." Moreover, such a retroactive application of *Owen* and *Monell* could severely and adversely affect public schools already struggling to supply quality education in an economy of rising costs. Here petitioners make very clear that there is a class of school teachers in addition to themselves waiting in the wing for

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[14] Comment, *The Role Of the Courts In Abolishing Governmental Immunity,* 1964 DUKE L.J. 888, 898-99. *See* Currier, *Time and Change In Judge-Made Law: Prospective Overruling,* 51 VA.L.REV. 201 (1965).

[15] 48 U.S.L.W. at 4397.

the respondents.[16] To apply these decisions retroactively would mean that funds otherwise available for programs in the schools must be used for back pay claims of teachers who never asked to come back to work after their pregnancies.

In *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 718-25 (1978), seven Justices of this Court agreed to deny retroactive readjustment of sex differentiated employee contributions to pension funds based upon a concern for the financial stability of insurance and pension plans throughout the country. The Court found that sex based differentiation in pension contributions violated Title VII's prohibition of classifications based on sex. However, the Court refused to permit retroactive relief in the form of pension adjustment because "retroactive liability could be devastating for a pension fund."[17] Similarly, in addressing the retroactive application of *Owen*, this Court must consider the financial effect of a retroactive application of *Owen* and *Monell* on local public schools.

Under the *Chevron* analysis, *Owen*, *Monell* and *LaFleur* should not be applied retroactively. The decisions were not foreshadowed; retroactive application will not further the policy of *Owen*, *Monell* or *LaFleur* and the equities favor a nonretroactive application, thus lessening the impact of judicial abrogation of municipal immunity.

Even if the prior decisions of this Court do not necessitate a nonretroactive application of *Owen*, *Monell* and *LaFleur*, this Court should not summarily apply these decisions retroactively to *Paxman*, as requested by petitioners, without full briefing and argument of the question of retroactivity,

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[16] *See* Petition For Writ of Certiorari, p. 7.
[17] 435 U.S. at 722.

which will impact substantially upon localities and their schools.

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the Petition For Writ of Certiorari. In the alternative, if the Court grants the writ respondents urge the Court to consider the question of retroactivity maturely and not reverse summarily the actions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 75-1506, et al.

SUSAN PAXMAN and LESLIE GOUGH,
Appellees,

v.

DR. W. E. CAMPBELL, Division Superintendent, Henrico County Public Schools;
MRS. JOHN DECESEBIO, Member Henrico County School Board;
CECIL CHILDRESS, Member, Henrico County School Board;
MRS. BETTY McMULLIN, Member, Henrico County School Board;
CECIL F. JONES, Member, Henrico County School Board;
OLIVER J. SANDS, JR., Member, Henrico County School Board;
REV. WALTER WHITT, Member Henrico County School Board, *Appellants.*

Filed July 22, 1980, U.S. Court of Appeals

On Motion for Recall of Mandate

Appellees, Susan Paxman, et al., have moved for the recall of our mandate so that we may consider amendment or reversal of our decision of this appeal in the light of Owen v. City of Independence, 48 U.S.L.W. 4389 (U.S. April 16, 1980).

The appellees' application for relief should be presented

in the first instance to the district court pursuant to Federal Rule of Civil Procedure 60(b). *See* 11 Wright & Miller, Federal Practice and Procedure §§ 2863 at 208-10 & n.12; 2864 at 223-24 and nn.51, 52, 53 (1973). Recall of our mandate is unnecessary. Standard Oil Company v. United States, 429 U.S. 17 (1976). We, of course, express no opinion on whether the appellees are entitled to the relief they seek.

WHEREUPON, it is ADJUDGED and ORDERED that the motion to recall the mandate is denied.

FOR THE COURT:

Clement F. Haynesworth, Jr.

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